Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

EDWARD H. MINOR,

Petitioner,

v.

STATE OF TEXAS, ET AL

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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ISSUES PRESENTED

1. Whether the holding of the Fifth Circuit, that the District Court lacked original jurisdiction in a matter where a citizen's civil and constitutional rights have been violated, is contrary to 42 USC § 1981, the 5th and 14th Amendments of the Constitution of the United States?

2. The Trial Court dismissed Petitioner's suit against Respondent Pat McDowell on the grounds of judicial immunity. Whether the holding of the Fifth Circuit, that the trial court's dismissal of Petitioner's complaint against Respondent McDowell on the grounds of judicial immunity, when the act was surely not a judicial act but merely a ministerial act"?

3. The Trial Court dismissed Petitioner's suit against Respondent Robert E. Day on the grounds of judicial immunity. Whether a judge is entitled to judicial immunity when he demonstrates bias and prejudice, deprives one of due process, and violates a citizen's civil and constitutional rights?

4. Whether a state judge should enjoy judicial immunity, when he or she violates state laws and rules of court, thus putting himself or herself above the very law said judge is sworn to interpret and uphold?

ISSUES PRESENTED - Continued

5. Whether private defendants who conspire with state employees to deprive one of due process and access to a state court because of race, pro se status, and national original is contrary to 42 USC § 1981, the 5th and 14th Amendments of the Constitution of the United States?

6. Whether the holding of the Fifth Circuit, that the State of Texas was entitled to dismissal based on the Eleventh Amendment doctrine, notwithstanding the fact that the State of Texas failed to plead or raise a defense under the Eleventh Amendment doctrine?

7. Whether a trial judge breached the role of impartiality when he makes a personal comment that "Plaintiff's allegations against the private defendants are wholly conclusory, having no basis save for Plaintiff's imagination"?

8. The District Court dismissed Petitioner's case under Fed.R.Civ.P 12(b)(6). The Appeals Court affirmed the District Court's dismissal for lack of subject-matter jurisdiction. Whether the Fifth Circuit should have dismissed the appeal for other reasons beside those points presented to it on appeal?

9. Whether specific allegations made against the Defendants considered "vague allegations of conspiracy"?

LIST OF PARTIES

State of Texas, District Judge, Pat McDowell, personally and as Presiding Judge, First Administrative Judicial Region; Dallas County, County Judge Robert E. Day, personally as Dallas County Judge; Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company, Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, A. J. Belohlavy, Fisk & Fielder, P.C., R. Lynn Fielder, and Jeff D. Fudge.

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II. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO THE "SOCALLED" JUDICIAL IMMUNITY VERSES CONSTITUTIONAL RIGHTS OF A CITIZEN.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO WHETHER EACH AND EVERY CITIZEN OF THESE UNITED STATES HAS AN EQUAL RIGHT TO JUSTICE AND EQUALITY REGARDLESS OF HIS OR HER RACE, COLOR, CREED, OR NATIONAL ORIGINAL.

IV. THIS CASE PRESENTS AN IMPORTANT QUESTION OF LAW AS TO THE JURISDICTION OF THE FEDERAL DISTRICT COURT IN MATTERS WHERE A CITIZEN'S CONSTITUTIONAL RIGHTS ARE VIOLATED.

A. THE DECISION OF THE FIFTH CIRCUIT CREATES A TRUE, DIRECT, AND IRRECONCILABLE CONFLICT WITH 42 USC § 1981, THE 5TH AND 14TH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES.

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No. _____

In The

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October Term, 1995

EDWARD H. MINOR,

Petitioner,

v.

STATE OF TEXAS, ET AL

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Edward H. Minor, *pro se*, respectfully petitions for a writ of certiorari to review the failure of the United States Court of Appeals for the Fifth Circuit to reverse and remand the errors of the United States District Court for the Northern District of Texas at Dallas in accordance with 42 USC § 1981, the 5th and 14th Amendments of the Constitution of the United States.

OPINIONS BELOW

The decision of the district court (App. 1-12) to dismiss 3:93-CV-0883-X was under Fed.R.Civ.P 12(b)(6). The decision of the court of appeals (App. 13-17) to dismiss 94-11076 was based on lack of subject-matter jurisdiction of the district court over the case.

BASIS FOR JURISDICTION

The final judgment of the court of appeals was entered on July 5, 1995. This Court has jurisdiction to review the judgment of the court of appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

28 USCS § 1654:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel.

Civil Rights Act of 1866 § 1 and 42 USC Section 1981:

"(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The tribunals of this Country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free from any bias or prejudice that might disturb the normal course of impartial judgment. Anderson v. Sheppard (1988, CA 6 Mich) 856 F.2d 741.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. 28 USCS § 1654.

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STATEMENT

I. This is a civil rights action. Suit was filed against District Judge Pat McDowell, Texas administrative judge, Dallas County Judge Robert E. Day (state employees), the State of Texas, Dallas County, the Allstate defendants, the law firm of Fisk & Fielder, PC, R. Lynn Fielder and Jeff D. Fudge on May 6, 1993, pursuant to 42 U.S.C. § 1981, subsequent Amendments, and the 5th, 6th and 14th Amendments of the Constitution of the United States.

Allstate Insurance Company issued to Petitioner under Number 216689137 a policy of insurance known as a homeowners insurance policy, which policy contained a clause known as the "Standard Homeowners Policy" clause, and which insurance policy was in full force and effect with all premiums paid at the time, between December 23, 1989 and January 9, 1990, when Plaintiff's residence was burglarized by some unknown person or persons.

After Allstate had formally denied Petitioner's insurance claim, Allstate arbitrarily raised the dwelling limits and premium on Petitioner's home despite the serious allegations of fraud made by Allstate through its agent Belohlavy.

Based upon Allstate's refusal to settle Petitioner's claim for burglary, a lawsuit was instituted to compel Allstate to pay under the contract between Petitioner and the Company.

Based upon Respondent Judge Day's blatant disregard for Texas procedural laws, Petitioner filed a motion to recuse the Judge. On November 12, 1992 Respondent Judge Day, **himself**, set Petitioner's Motion to Recuse Judge for hearing.

On December 8, 1992, the **Local Administrative Judge** signed an Order transferring Plaintiff's case from County Court at Law No. 4 to County Court at Law No. 1 **without a Hearing**, contrary to Rule 18a(a) of the Texas Rules of Civil Procedure.

On December 18, 1992, Wanda Collins, Deputy County Clerk of Dallas County, signed a Notice setting Plaintiff's case for Trial on February 1, 1993 at 9:00 A.M., although the case was still in the discovery phase of the lawsuit.

On January 14, 1993, Defendant Judge McDowell entered an Order stating that:

> a) "Plaintiff's Motion to Recuse having been filed and it appearing that the trial court **has not voluntarily recused himself** and a hearing is necessary to determine the merits of the Motion to Recuse; (Emphasis Added)
>
> b) "it is the Order of the Presiding Judge of the First Administrative Judicial Region that styled and numbered cause CC-92-05587-D **shall be returned to County Court at Law No. Four of Dallas**

County, after which a Judge shall be assigned by the Presiding Administrative Judge of the First Administrative Judicial Region to hear and determine the merits of the Motion to Recuse; and (Emphasis Added)

c) "it is further ordered that any other orders concerning the Motion to Recuse or transfer of this cause are dissolved and held for naught, and that any other orders made after the Motion to Recuse was filed are set aside pending hearing on the Motion to Recuse."

On page 7 of Defendant Companies' and Individual Defendants' Response to Plaintiff's Numerous Motions Currently on File And Defendants' Motion For Sanctions, Defendant Attorney Fudge, stated that Plaintiff "**fancies himself an attorney**".

II. The Facts

1. - Petitioner was discriminated against by Allstate Insurance Company when it denied his insurance claim because of race.

2. The Defendants-Respondents, in concert with each other, have violated Plaintiff's civil liberties as follows;

(a) deprived Plaintiff of due process under the Constitutions of the United States and the State of Texas;

(b) discriminated against Plaintiff in depriving Plaintiff

of his civil rights based on race;

(c) discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice; and

(d) the restraint of trade by Defendants against Plaintiff because Plaintiff chose to represent himself as Plaintiff, Pro Se in the Cause of Action styled Edward H. Minor vs. Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy, filed in Dallas County Court At Law No. 4 (CC-92-05587-D).

3. The defendants conspired to deprive and did deprive him of his federally secured rights under the Constitution of the United States.

Section 1 of the Civil Rights Act of 1866 and 42 USC Section 1981 provide that:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

On June 7, 1993 Plaintiff-Appellant served Plaintiff's First Request For Admissions and Plaintiff's First Set of Interrogatories on the respective Defendants.

The Defendants-Appellees, except Defendant-Appellee State of Texas, filed Motions for Protective Orders and Motions To Dismiss. By Court's orders of Reference filed June 21, 1993 and July 9, 1993, United States Magistrate Jane J. Boyle heard and granted on a "wholesale" basis the Protective Order Motions to all of the defendants on July 6, 1993 and July 30, 1993 respectively. However, at the hearing on July 30th, Magistrate Boyle made a pointed statement to Plaintiff **that she had not read Plaintiff's response filed in his Motion to Quash**; notwithstanding Magistrate Boyle still ruled on the Motions and granted the Defendants their motions for protective order.

On July 28, 1993, **two days prior to the hearing set by Magistrate Boyle, the Court granted**, on a "wholesale" basis, all of the defendants' motion to dismiss, and denied, on a "wholesale" basis, Plaintiff's responses and motions to quash, App.5.

REASONS FOR GRANTING THE WRIT

1. The holding of the Fifth Circuit, that the District Court lacked original jurisdiction in a matter where a citizen's civil and constitutional rights have been violated, is contrary to 42 USC § 1981, the 5th and 14th Amendments of the Constitution of the United States.

The United States District Court has jurisdiction over a cause of action that arises under 42 USC Section 1981, the 5th, 6th and 14th Amendments of the Constitution of the United States.

Contrary to the holding of the Fifth Circuit that Petitioner's complaint was an appeal from a state court decision, when the complaint was filed in the district court, the state court case was still in progress.

Petitioner was deprived of due process and equal protection under the Constitution of the United States; deprived of his civil rights based on race; deprived of his constitutional rights to counsel of one's choice; and discriminated against because Petitioner proceeded "pro se" in the state court litigation, thus restraint of trade in the Cause of Action styled Edward H. Minor vs. Allstate

Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy, filed in Dallas County Court No. 4 (CC-92-05587-D).

2. The holding of the Fifth Circuit, that if the District Court had jurisdiction over this matter, it would have dismissed this case upholding the doctrine of judicial immunities for Pat McDowall and Robert Day, is an important question of law about the extent to which, consistent with the United States Constitution, state court judges can enjoy the "so-called" judicial immunity.

3. The holding of the Fifth Circuit, that the State of Texas should be dismissed under the Eleventh Amendment doctrine, is an important question of law when the State failed to plead Eleventh Amendment as a defense.

The State of Texas failed to plead or raise a defense under the Eleventh Amendment doctrine upon which the trial judge dismissed Plaintiff-Appellant's action against it. Appellee State of Texas also failed to plead that it did not consent to this suit. Appellee merely pleaded improper and untimely service as grounds for dismissal of Appellant's case. The Trial Judge, notwithstanding these facts, constructively "represented" Appellee State of Texas in his motion to dismiss, pleading Eleventh Amendment of the US Constitution.

4. Notwithstanding the numerous exhibits presented with Plaintiff's Original Complaint which showed the interaction by and among all of the defendants, the trial judge, in his Order dismissing Plaintiff-Appellant's lawsuit against the defendants, stated that Plaintiff-Appellant's "allegations against the private defendants are wholly conclusory, having no basis save for Plaintiff's imagination."

5. The trial court stated in its motion to dismiss that "Because Minor is a pro se litigant, this Court provided him with an extension of time to serve properly the State of Texas." However, it is significant that the trial court, knowing that Minor was a pro se litigant, did not apprise him that the State of Texas was not properly served **until after** the Appeals Court had dismissed Appellant's first appeal because, constructively, the trial court had refused to grant Plaintiff-Appellant's motion for default judgment **by ignoring said motion**, causing Appellant undue and unnecessary expense of litigation.

An action under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears to be a certainty that the Plaintiffs are entitled to no relief under any state of facts which could be proved in support of their claims. *Escalera v. New York City Housing Authority* (1970, CA2 NY) 425 F.2d 853, cert den 400 US 853, 27 L.Ed 2d 91, 91 S.Ct 54; *Mayberry v. Prasse* (1971. CA3 Pa) 449 F.2d 1266; *Garcia v. United States* (1982, SD

Tex) 538 F.Supp 814; *Rogers v. Provident Hospital* (1965, ND Ill) 241 F.Supp 633. Even a flawed complaint must be construed as to do substantial justice. *Durham v. Parks* (1983, DC Minn) 564 F.Supp 244.

When faced with a motion to dismiss, the court should give the pleadings of a pro se Plaintiff especially lenient treatment. This means that before the court dismisses the complaint of a pro se Plaintiff, the party should be given an opportunity to offer evidence, or to further particularize the claim. *Walter v. Butkovich* (1985, MD NC) 605 F.Supp 1137.

The trial court Magistrate, Jane Boyle ruled on motions at the hearing for protective orders after stating, pointedly, that she had not read Plaintiff's responses and opposition to defendants' motions but she, nonetheless, ruled and granted defendants' motions for protective order.

Rule 12(b)(6) of the Federal Rules of Civil Procedure regarding dismissals for failure to state a claim upon which relief can be granted are scrutinized with special care in civil rights actions. *Gotkin v. Miller* (1974, ED NY) 379 F. Supp 859, affd (CA2 NY) 514 F.2d 125; *Dunleavy v. Ternullo* (1976, SD NY) 410 F.Supp 1166; *Westray v. Porthole, Inc.* (1984, DC Md) 586 F.Supp 834; *Azar v. Conley* (1972, CA6 Ohio) 456 F.2d 1382; 15 FR Serv 2d 1179, later app (CA6 Ohio) 480 F2d 220; 17 FR Serv 2d 444; *Westlake v. Lucas* (1976, CA6 Mich) 537 F2d 857. The court must presume all factual allegations of the

complaint to be true. *Neitzke v. Williams* (1989, US) 104 L.Ed 2d 338, 109 S.Ct 1827; *Usher v. Los Angeles* (1987, CA9 Cal) 828 F.2d 556. The court must draw all reasonable inferences in favor of the nonmoving party. *Usher v. Los Angeles* (1987, CA9 Cal) 828 F.2d 556. A fair trial in a fair tribunal is a basic requirement of due process.

Petitioner contends that the trial court erred in not scrutinizing Plaintiff's pleadings with due care, diligence or interest when it granted defendants their motions to dismiss. The trial court was not free from bias or prejudice and therefore did not render an impartial judgment.

Private parties may be reached in civil rights actions when private individuals and companies join with state officials to violate a person's constitutional rights. Jurisdiction may be conferred by 28 USCS § 1343(A)(3) over the private individual [*Adickes v. S.H. Kress & Co.* (1970) 398 US 144, 26 L.Ed 2d 142, 90 S.Ct 1598; *Brooks v. Peters* (1971, ED Win) 322 F.Supp 1273] even though the state official may be immune from suit. *Sparks v. Duval County Ranch Co.* (1979, CA5 Tex) 604 F.2d 976, affd 449 US 24, 66 L.Ed 185, 101 S.Ct 183.

A private individual and/or company may be named in a civil rights action when the party has taken some action which has, in turn, triggered other action by state officials. *Long v. Citizen's Bank & Trust Co.* (1983, DC Kan) 563

F.Supp 1203.

CONCLUSION

The complaint in an action under 42 USCS § 1981 is insufficient unless it alleges a deprivation of civil rights. Plaintiff complained that these Defendants, in concert with each other, have violated Plaintiff's **civil liberties; deprived Plaintiff of due process** under the Constitutions of the United States and the State of Texas; **discriminated against Plaintiff in depriving Plaintiff of his civil rights based on race**; **discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice**; and **the restraint of trade** by Defendants against Plaintiff because Plaintiff chose to represent himself as Plaintiff, Pro Se in the Cause of Action styled **Edward H. Minor** vs. **Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy**, filed in Dallas County Court At Law No. 4 (CC-92-05587-D).

The defendants conspired to deprive and did deprive him of his federally secured rights under the Constitution of the United States.

The two primary considerations for a court's analysis of the propriety of dismissal under Rule 12(b)(6) estab-

lished by the United States Court of Appeals for the Fifth Circuit were not followed by the trial judge or the Fifth Circuit Court itself. First, the trial court must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the Plaintiff. *Kaiser Aluminum*, 677 F.2d at 1050. Plaintiff documented with supporting exhibits the actions of the defendants, and supplied legal authorities to support his claims against these defendants. However, the trial court did not accept as true the facts in the complaint, and they were construed in favor of the defendants. For instance, Defendants-Appellees Allstate, Fisk & Fielder, PC, R. Lynn Fielder and Jeff D. Fudge's Motion to Dismiss was filed under Rule **126(b)(6)** instead of Rule **12(b)(6)**. Although Plaintiff filed a motion to quash that defective motion, the trial court denied Plaintiff's motion to quash. Second, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts that would entitle it to relief. Plaintiff did prove that there was a conspiracy between and among the defendants to deprive Plaintiff of his constitutionally guaranteed rights because of his race and "pro se" status.

The trial judge dismissed the case **two days before** the hearing set by the Court regarding Defendants-Appellees' Motions for Protective Order.

The trial court Magistrate ruled on motions at hearing

for protective orders after informing Plaintiff that she had not read Plaintiff's responses and opposition to defendants' motions but said Magistrate, nonetheless, granted the motions to the defendants.

It is prejudicial error for the trial judge to make remarks that make it evident that he harbors feelings of bias or hostility toward a party or his counsel.

Based upon the foregoing, it is clear that the Trial Court has erred in granting its "wholesale dismissal" of Plaintiff-Appellant's lawsuit. First, The Supreme Court's admonition that pro se civil rights complaints be construed more liberally than those drafted by lawyers, *Tosta v. Hooks*, 568 F.Supp 616, and that all pleadings shall be so construed as to do substantial justice, *Campbell v. U.S. Navy*, 567 F.Supp 356, was not applied, adhered to, or upheld in the Trial Court's decision in this case. Second, In order to maintain an action under 42 USCS § 1985, **a party is not required to first exhaust administrative or state court remedies**. *Hazzard v. Wienberger* (1974, SD NY) 382 F.Supp 225, affd without op (CA2 NY) 519 F.2d 1397; *Prochaska v. Fediaczko* (1978, WD Pa) 458 F.Supp 778; *Burt v. New York* (1946, CA2 NY) 156 F.2d 791.

The errors of the Trial Court and the Fifth Circuit resulted in justice not being served and Petitioner respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

EDWARD H. MINOR, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 3:93-CV-883-X
STATE OF TEXAS, et. al., Defendants.	§	(Filed Jul 29,1993)

ORDER

NOW before the Court is the Motion to Dismiss Under Rule 129 [sic] (b)(6) filed by the Allstate defendants, defendants Hedien, Kiefer, Winn, Briggs, Elliott, Belohlavy, Fielder, Fudge and Fisk & Fielder, P.C. on June 14, 1993. Plaintiff, pro se, filed a motion to quash these defendants' 12(b)(6) motion, but has not otherwise responded to it.

This case arises from a battle in state court between an insured, Plaintiff herein, and his insurer. Allstate issued a homeowners policy to Plaintiff. After Plaintiff's house was burglarized, Plaintiff sought recovery under his policy. When Allstate denied coverage, Plaintiff sued in state court. Allstate filed a plea in

abatement for Plaintiff's failure to comply with a mandatory policy requirement that he submit to an examination under oath. The court granted Allstate's plea and order the action abated for sixty days or until complied with the policy requirement. Disagreeing with the court's ruling, Plaintiff filed a motion to recuse the presiding judge, which was heard and denied by another judge. Plaintiff then filed this suit, alleging that multiple judges, state entities and private defendants violated his rights under the 5th, 6th and 14th Amendments and under 42 U.S.C. § 1981. Plaintiff seeks $25,000,000 in damages.

A motion under Rule 12(b)(6) tests the legal sufficiency of claims stated in the complaint and must be evaluated solely on the basis of the pleadings. *Jackson v. Procunier*, 789 F.2d 307 (5th Cir. 1986). However, material that is properly appended as a part of the complaint may receive consideration.[1] *Neville v. American Republic Ins. Co.*, 912 F.2d 813, 814 n.1 (5th Cir. 1990); *Hal Roach Strdios v. Richard Feiner and Co.*, 883 F.2d 1429, 1441 n.18 (9th Cir. 1989). The Court must decide whether the material facts alluded, which must be taken as true, *Williamson v. Tucker*, 645 F.2d 404 (5th

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[1]See Fed.R.Civ.P.10(c): "A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."

Cir. 1981), cert denied, 454 U.S. 897 (1981), would entitle a Plaintiff to offer evidence regarding the legal remedy requested. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). Unless the answer is unequivocally "no," the motion must be denied. *Conley v. Gibson*, 355 U.S. 41, 45-6 (1957). Many courts look askance at Rule 12(b)(6) because of the role pleadings play in federal practice and the liberal policy regarding amendment. "The motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipuyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105 (1983), *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974).

The United States Court of Appeals for the Fifth Circuit has established two primary considerations for a court's analysis of the propriety of dismissal under Rule 12(b)(6). First, the court must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the Plaintiff; however, the court will not accept conslusory allegations in the complaint as true. *Kaiser Aluminum*, 677 F.2d at 1050. Second, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts that would entitle it to relief. *Id.*

Initially, the Court notes that it is unclear from

Plaintiff's complaint whether he asserts all of his causes of action against all defendants, or whether some claims are meant for some defendants but not for others. His claims regarding constitutional deprivations must be dismissed as against the private defendants because those defendants are not state actors. This conclusion leaves the Section 1981 claim. Unfortunately, Congress has not provided an analogue to 28 U.S.C. § 1915 (d) for Plaintiffs who are not proceeding in forma pauperis. Had it done so, the Section 1981 claim, not to mention the whole case, would be dismissable as frivolous. In any event, upon reviewing the complaint, the Court concludes that Plaintiff could prove no set of facts entitling him to relief. His allegations against the private defendants are whole conclusory, having no basis save for Plaintiff's imagination. Simply put, he has alleged no conduct by the private defendants that is cognizable under Section 1981. For this reason, Defendants' motion is hereby **GRANTED**. Plaintiff's complaint is hereby **DISMISSED** as against the private defendants.

SO ORDERED.

July 28th, 1993.

/s/ **Joe Kendall**
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

EDWARD H. MINOR, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 3:93-CV-883-X
STATE OF TEXAS, et. al., Defendants.	§	(Filed Aug 30,1993)

ORDER

NOW before the Court are Defendants Dallas County and County Judge Robert E. Day's Motion to Dismiss or, alternatively, for Summary Judgment, filed on July 21, 1993, Plaintiff's response to that motion and Defendants' reply to the response. Having considered these filed materials and the applicable law, the Court determines that Defendants' motion should be, and hereby is, **GRANTED**.

This case arises from a battle in state court between an insured, Plaintiff herein, and his insurer. Allstate issued a homeowners policy to Plaintiff. After Plaintiff's house was burglarized, Plaintiff sought recovery under his policy. When Allstate denied coverage,

Plaintiff sued in state court. Allstate filed a plea in abatement for Plaintiff's failure to comply with a mandatory policy requirement that he submit to an examination under oath. The court granted Allstate's plea and order the action abated for sixty days or until complied with the policy requirement. Disagreeing with the court's ruling, Plaintiff filed a motion to recuse the presiding judge, which was heard and denied by another judge. Plaintiff then filed this suit, alleging that multiple judges, state entities and private defendants violated his rights under the 5th, 6th and 14th Amendments and under 42 U.S.C. § 1981. Plaintiff seeks $25,000,000 in damages.

Judge Day and Dallas County, movants herein, seek dismissal of Plaintiff's claims. Judge Day presided over the suit in state court described above. It is unclear what Plaintiff alleges against the county. The only discernible nexus between the county and this suit is Judge Day's status as a county judge.

Fifth Circuit precedent clearly provides that one in Judge Day's position is entitled to absolute judicial immunity, which "extends to all judicial acts which are not performed in clear absence of all jurisdiction." *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). Because Plaintiff's claims against Judge Day concern actions when Judge Day acted within his jurisdictional authority, Plaintiff's complaint as

to him must be dismissed.

Plaintiff's complaint makes no allegations whatsoever of conduct attributable to the county. In his response, Plaintiff appears to allege a respondeat superior theory as has basis for including the county in his complaint. Plaintiff's complaint as to the county must be dismissed because he alleges no conduct attributable to the county, and because his respondeat theory, which is not even pleaded but merely offered in his response to the instant motion, would fail anyway. See *Jett v. Dallas Indep. Scyh. Dist.*, 491 U.S. 701 (1989) (holding that a municipality may not be held liable under a respondeat theory in a Section 1981 case).

For the foregoing reasons, Plaintiff's complaint as to Judge Day and Dallas County is hereby **DISMISSED**.

SO ORDERED.

August 30th, 1993.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

EDWARD H. MINOR, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 3:93-CV-883-X
STATE OF TEXAS, et. al., Defendants.	§	(Filed Jul 28,1993)

ORDER

NOW before the Court is Defendant's Motion to Dismiss, filed on June 17, 1993, by Defendant McDowell. Plaintiff has not responded to this motion. Having considered the motion and the applicable law, the Court concludes that Defendant McDowell's motion should be, and hereby is, **GRANTED**.

This case arises from a battle in state court between an insured, Plaintiff herein, and his insurer. Allstate issued a homeowners policy to Plaintiff. After Plaintiff's house was burglarized, Plaintiff sought recovery under his policy. When Allstate denied coverage, Plaintiff sued in state court. Allstate filed a plea in abatement for Plaintiff's failure to comply with a manda-

tory policy requirement that he submit to an examination under oath. The court granted Allstate's plea and order the action abated for sixty days or until complied with the policy requirement. Disagreeing with the court's ruling, Plaintiff filed a motion to recuse the presiding judge, which was heard and denied by another judge. Plaintiff then filed this suit, alleging that multiple judges, state entities and private defendants violated his rights under the 5th, 6th and 14th Amendments and under 42 U.S.C. § 1981. Plaintiff seeks $25,000,000 in damages.

Defendant McDowell is judge of the Criminal District Court No. 5 of Dallas County. Judge McDowell presided over Plaintiff's motion to recuse Judge Robert E. Day in Plaintiff's state suit against his insurer. Fifth Circuit precedent clearly provided that one in Judge McDowell's position is entitled to absolute judicial immunity, which "extends to all judicial acts which are not performed in clear absence of all jurisdiction." *Adams v. McIlhany*,764 F.2d 294, 297 (5th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986). Because Plaintiff's claims against Judge McDowell concern actions when Judge McDowell acted within his jurisdictional authority, Plaintiff's complaint as to him must be, and hereby is,

against Judge McDowell concern actions when Judge McDowell acted within his jurisdictional authority, Plaintiff's complaint as to him must be, and hereby is,

DISMISSED.

SO ORDERED.

July 28th, 1993.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

EDWARD H. MINOR, Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 3:93-CV-883-X
STATE OF TEXAS, et. al., Defendants.	§	(Filed Nov 02,1994)

ORDER

Previously, this Court dismissed the majority of the defendants present in this suit. Plaintiff appealed those dismissals to the Fifth Circuit Court of Appeals. The Fifth Circuit dismissed Minor's appeal because the State of Texas remained as a defendant. After an examination of the documents on file in this action, the Court discovered that the State of Texas had not been properly served. Because Minor is a pro se litigant, this Court provided him with an extension of time to serve properly the State of Texas. The State of Texas has now been served and has filed a Motion to Dismiss based upon improper and untimely service. While the State's motion to dismiss is well taken, this Court finds that the more

prudent course is to dismiss this action under the authority of the Eleventh Amendment.

Although Plaintiff includes the State of Texas as a nominal defendant herein, the inclusion runs afoul of the Eleventh Amendment, which provides as follows:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against on of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI. The Amendment also bars suits by citizens against their own state. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Eleventh Amendment generally divests federal courts of jurisdiction to entertain suits directed against states. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304 (1990). A state may, however, consent to a suit otherwise prohibited, but unless consented to, the Eleventh Amendment acts as a jurisdictional bar. *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934, 937 (5th Cir. 1992). The limitation applies equally to state agencies, *Will v. Michigan Dept. State Police*, 491 U.S. 58 (1989), and regardless of the relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). Congress, however, pursuant to its power to enforce the Fourteenth

Amendment, see U.S. CONST. amend. XIV, § 5, may abrogate Eleventh Amendment immunity in certain circumstances. See Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989). For instance, although Congress has clearly abrogated such immunity with respect to Title VII cases, see Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (Eleventh Amendment and principles of state sovereignty that is embodies are necessarily limited by the enforcement provision of the Fourteenth Amendment; Title VII abrogates states' Eleventh Amendment immunity); however, it has not done so for Section 1981 suits. See Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748, 762 n.13(5th Cir. 1986).

Because the State of Texas has not consented to being sued in federal court in connection with Plaintiff's claims against it in this case, the State of Texas must be dismissed as a defendant because of Eleventh Amendment immunity. Accordingly, this action is DISMISSED with prejudice for failure to state a claim upon which relief can be granted. The Clerk of the Court is ORDERED to close this case and to notify all parties remaining i n this action of the case's DISMISSAL. Since the State of Texas was the last remaining defendant in this action, the Court ORDERS that this case's DISMISSAL. Since the State of Texas was the last remaining defendant in this action, the Court ORDERS that this case is hereby

CLOSED.

SO ORDERED.

November 2nd, 1994.

/s/ Joe Kendall
JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
For the Fifth Circuit

FILED
Jul 05, 1995

No. 94-11076
Summary Calendar

EDWARD H. MINOR,

Plaintiff-Appellant,

VERSUS

STATE OF TEXAS, ET AL,

Defendants-Appellees.

Appeal from the United States District Court
For the Northern District of Texas

(3:93-CV-0883-X)

Before REYNALDO G. GARZA, SMITH and WIENER, Circuit Judges.

PER CURIAM:[2]

Plaintiff-Appellant Edward H. Minor proceeding pro se filed the suit before us on May 6, 1993 in the United States District Court for the Northern District of Texas for the alleged misconduct on the part of every person who was either a defendant, attorney,or judge in a civil lawsuit fired by him on June 30, 1992 in Dallas County Court at Law. Minor alleges in his suit that the defendants violated 42 USC Section 1981 and his Fifth, Sixth and Fourteenth Amendment rights and he sought $25,000,000 in damages.

The suit filed by Minor against Allstate arose out of Allstate Insurance Company's refusal to settle Minor's claim under a homeowner's policy due to Minor's repeated refusal to submit to an examination under oath concerning his alleged loss as required in the policy. In the suit before us Edward H. Minor alleged a widening list of procedural errors on the part of two state court judge who according to him, violated several provisions

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[2]Local Rule 47.5 provides: "The publication of opinions that have no precedent value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

of the United States Constitution. Minor also sued Allstate's counsel of record in the state court litigation claiming that they attempted to create bias against him because he was acting pro se in the instant litigation. The defendant Judge Day, in the state court's suit gave Minor 60 days in which to appear, and under oath state what his claim on the policy was. When Minor refused to comply his case against Allstate was dismissed.

Minor south recusal of Judge Day because he demonstrated apparent bias and prejudice. In the present suit he is suing Judge McDowell who presided over the recusal proceedings claiming that he was prejudiced against him because he set the motion for recusal for hearing untimely and only after Allstate requested that it be set for hearing. He also claims that Judge McDowell did not distribute copies of orders and notices to him. Minor sued the State of Texas claiming that through its Commission on Judicial Conduct, it had dismissed his complaint against Judge Day, despite evident that Judge Day had blatantly disregarded various rules of Texas Civil Procedure and the Fifth, Sixth and Fourteenth Amendments, in violation of his constitutional rights. He made no specific allegations against Dallas County. He sued Allstate and sued some of its employees, and its attorneys Fisk & Fielder as a firm and individually because they were all acting in a conspiracy against him

because he was acting pro se and was black.

The Court below granted each of the defendant's motions to dismiss under Fed.R.Civ.P. 12(b)(6). He dismissed Judges Day and McDowell on the grounds that they were entitled to absolute judicial immunity. The Court also determined that Minor's constitutional claims against Allstate, its employees and its attorneys should be dismissed because none were state actors and Minor had not alleged any conduct by the private defendants that was cognizable under Section 1981. He dismissed Dallas County on the grounds that Minor had not made any specific allegations against the County and dismissed the State of Texas on Eleventh Amendment grounds.

If the District Court below had jurisdiction over this case, all of the dismissals under Fed.R.Civ.P. 12(b)(6) would have been upheld. However, the court should have dismissed this case for lack of subject matter jurisdiction under the Tooker-Feldman doctrine. Pursuant to the rule established in Rooker v. Fidelity Trust Co., 263 U.S. 413, 416 (1923), no court of the United States other than the Supreme Court may entertain a proceeding to reverse or modify a final state court judgment because the jurisdiction of the district courts is strictly original and review of such determinations would constitute an exercise of appellate jurisdiction. In District of Columbia Court of Appeals v. feldman, 460 U.S. 462,

482-87 (1983), the Supreme Court recognized an exception to the rule in Rooker, when a general challenge is made to the constitutionality of state statue. The Feldman exception does not apply, however, when the constitutional claim was raised and decided in the state court, such claim being "inextricably intertwined" with the state court judgment.

Our court in Hale v. Harney, 786 F.2d 688 (5th Cir. 1986), a civil rights case that originated in a state court divorce lawsuit, was faced with the very question before us. Quite similar to Minor's contentions the plaintiff made "vague allegations of conspiracy" in bringing his civil rights action concerning events that had transpired in the related state court proceeding.

Just as our court called the action in that case "palpably frivolous" and affirmed the trial court's dismissal of the action, we also do the same. The case before us was actually an appeal from the judgment in the state court against Minor. Minor's recourse was with the state appellate courts and thereafter the United States Supreme Court on application for writ of certiorari, not by the complaint filed here. The district court's dismissal should be affirmed on the ground that it lacked jurisdiction to review Minor's claims. Sojourner T. v. Edwards, 974 F.2d 27, 30 (5th Cir. 1992), cert. denied, 113 S.Ct. 1414 (1993), and Mangaroo v. Nelson, 864 F.2d 1202,

n.2 (5th Cir. 1989), both bolding that an appellate court may affirm a judgment on any basis supported by the record. The dismissal of this cause of action is its entirety is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

EDWARD H. MINOR)
)
V.)
)
STATE OF TEXAS;)
DISTRICT JUDGE PAT MCDOWELL)
PERSONALLY AND AS PRESIDING)
JUDGE, FIRST ADMINISTRATIVE)
JUDICIAL REGION;)
DALLAS COUNTY;)
COUNTY JUDGE ROBERT E. DAY)
PERSONALLY AND AS DALLAS)
COUNTY JUDGE;)
ALLSTATE INSURANCE COMPANY;)
ALLSTATE PROPERTY AND CASUALTY)
COMPANY;)
ALLSTATE TEXAS LLOYD'S INSURANCE)
COMPANY, INC.; WAYNE E. HEDIEN;)
RAYMOND H. KIEFER; DAVID B.)
WINN; GARY E. BRIGGS; JANE)
ELLIOTT; A. J. BELOHLAVY;)
FISK & FIELDER, PC;)
R. LYNN FIELDER;)
JEFF D. FUDGE)

PLAINTIFF'S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, EDWARD H. MINOR, hereinafter referred to as "**Plaintiff**", complaining of **State of Texas,** (hereinafter referred to as "**Defendant State**"); **State of Texas District Judge Pat McDowell personally and as Presiding Judge of the First Administrative Judicial Region,** (hereinafter referred to as "**Defendant Judge McDowell**"); **Dallas County**, (hereinafter referred to as "**Defendant County**"); **Dallas County Judge Robert E. Day personally and as Dallas County Judge**, (hereinafter referred to as "**Defendant Judge Day**"); **Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.**, (hereinafter referred to as "**Defendant Companies**"); **Wayne E. Hedien**, President of Allstate Insurance Company; **Raymond H. Kiefer**, President of Allstate Property and Casualty; **David B. Winn**, President of Allstate Texas Lloyd's, Inc.; **Gary E. Briggs**, Regional Vice President of Allstate; **Jane Elliott**, Unit Claim Manager of Allstate; And **A. J. Belohlavy**, Senior Claim Representative of Allstate, (hereinafter referred to as "**Individual Defendants**"); **Fisk & Fielder, PC**, (hereinafter referred to as "**Defendant Law Firm**"); **R. Lynn Fielder, personally and as** Attorney with Fisk & Fielder; and **Jeff D. Fudge, personally and as** Attorney with Fisk & Fielder, (hereinafter referred to as "**Defendant Attorneys**"), **individually, jointly and severally**, and for cause of action would show to this Honorable

Court and Jury as follows:

I.

Plaintiff is a citizen of the United States and resident of Dallas County, Texas. Defendant State of Texas is a political subdivision of the United States and service can be had on Defendant State by serving the Attorney General, State of Texas, with process at 714 Jackson Street, Suite 800, Dallas, Texas 75202-4506.

Defendant Dallas County is a political subdivision of the State of Texas and service can be had by serving Dallas County Judge with process at c/o Dallas County Judge, Dallas County Commissioners Court, Administration Building, 411 Elm Street, Dallas, Texas 75202. Defendant Judge Pat McDowell is a District Court Judge of the State of Texas and Presiding Judge of the First Administrative Judicial Region and service can be had on Defendant Judge McDowell by serving him at First Administrative Judicial Region, The State of Texas, 600 Commerce Street, Sixth Floor, Dallas, Texas 75202. Defendant Robert E. Day is a Dallas County Court Judge presiding over Dallas County Court at Law Number Four, and service can be had on Defendant Judge Day by serving him at County Court at Law No. 4, Records Building, Third Floor, 500 Main Street, Dallas, Texas 75202.

Defendants Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc. are insurance companies who have their principal office located in Allstate Plaza, Northbrook, Illinois 60062-6116, and are engaged in the sale and servicing of insurance policies in the State of Texas. Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, And A. J. Belohlavy are officers and employees of the insurance companies, and service can be had on Defendants Companies and Individual Defendants by serving them at their registered agent for service, Lillie Furlong at 222 W. Las Colinas Blvd., Irving, Texas 75039.

Fisk & Fielder, PC, is a law firm doing business in Dallas, Texas; R. Lynn Fielder, and Jeff D. Fudge are lawyers engaged in the practice of law with the law firm of Fisk & Fielder, PC., and service can be had on Defendant Law Firm and Defendant Attorneys by serving them at Fisk & Fielder, PC., 2710 Stemmons Freeway, 400 Tower North, Dallas, Texas 75207.

II.

This Court has jurisdiction of this cause because this action arises under 42 USC Section 1981, the 5th, 6th and 14th Amendments of the Constitution of the United States.

III.

1. Defendants have **deprived Plaintiff of due process** and equal protection under the Constitution of the United States;

2. Defendants have **discriminated against Plaintiff in depriving Plaintiff of his civil rights based on race;**

3. Defendants have **discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice**;

4. Defendants have **discriminated against Plaintiff because Plaintiff is "pro se" thus restraint of trade** in the Cause of Action styled Edward H. Minor vs. Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy, filed in Dallas County Court No. 4 (CC-92-05587-D), (hereinafter referred to as "**The Case**"); and

5. Defendant Judge McDowell and Defendant Judge Day have **misused and abused the constituted authority** as a Texas Judge and Presiding Judge of the First Administrative Judicial Region, and a Dallas County Judge respectively.

6. Plaintiff has exhausted all administrative remedies afforded him without any success. All efforts to resolve these actions by the Defendants without the necessity of court intervention have been attempted and failed.

IV.

Defendant Companies issued to Plaintiff under Number 216689137 a policy of insurance known as a homeowners insurance policy, which policy contained a clause known as the "Standard Homeowners Policy" clause, and which insurance policy was in full force and effect with all premiums paid at the time, between December 23, 1989 and January 9, 1990, when Plaintiff's residence was burglarized by some unknown person or persons.

V.

Plaintiff properly filed claim of loss with Defendant Companies. Defendant Companies refused and have continued to refuse to settle Plaintiff's claim, claiming that Plaintiff failed to appear for, what was constructively by the elements thereof, a "deposition hearing" which they called a "formal hearing" and consequently asserted that Plaintiff may be guilty of "concealment fraud". As a result of Defendant Companies' actions, Plaintiff has been denied homeowners policy insurance from other

companies and has suffered emotional anguish and financial loss.

VI.

Plaintiff further alleges that prior to Defendant Companies' failure to fix broken window of Plaintiff's home, leaving it vulnerable to repeated burglary and formal refusal to settle Plaintiff's claim, Individual Defendant Belohlavy acted in an irregular fashion in handling the claim based upon his personal prejudice and bias against Plaintiff based on race. Individual Defendants Elliott and Briggs supported such actions of prejudice and bias based on race by Individual Defendant Belohlavy.

After Defendant Companies had formally denied Plaintiff's insurance claim, Allstate arbitrarily raised the dwelling limits and premium on Plaintiff's home despite the serious allegations of fraud made by Allstate through its agent Individual Defendant Belohlavy.

VII.

Based upon Defendant Companies' refusal to settle Plaintiff's claim for burglary, Plaintiff instituted a lawsuit to compel Defendant Companies to pay under the contract between Plaintiff and Defendant Companies.

VIII.

On October 23, 1992, Defendant Judge Day heard Defendant Companies' Plea In Abatement and Supplement to Plea In Abatement filed in The Case.

Several friends and acquaintances of Plaintiff attended that Hearing. Several cases were heard that morning before The Case was called. During the hearing of those cases, the group was allowed to stay in the courtroom and was not asked whether they were witnesses or not.

The Case was **No. 6** on the Docket. After the first **five** cases were heard, Defendant Judge Day asked if Edward Minor was there and Plaintiff appeared before Defendant Judge Day. Defendant Judge Day asked Plaintiff if he had a lawyer, and Plaintiff told him no, he didn't. Defendant Judge Day told Plaintiff, in a rather sarcastic manner, "You better get a lawyer"; then he ordered Plaintiff to sit down and continued to call other cases.

After **all the cases were heard** and the respective parties left, Defendant Judge Day called The Case. Prior to that, Defendant Attorney Fudge and Individual Defendant Belohlavy, (Allstate's Adjuster) were seen in earnest conversation with The Court's Bailiff, Charlie Spencer.

After calling The Case, Defendant Judge Day asked the people who had come to listen to The Case (the only ones who were left in the courtroom) if there were any witnesses to The Case, and they indicated that they were not. Individual Defendant Belohlavy indicated that he was a witness in The Case. The group in the courtroom were quiet and orderly and were not witnesses in The Case.

Rule 267, Witness Placed Under Rule, of the Texas Rules of Civil Procedure states:

> **a) At the request of either party, in a civil case, the witnesses on both sides shall be sworn and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under the rule.**
>
> **b) This rule does not authorize exclusion of (1) a party who is a natural person or the spouse of such natural person ..." (emphasis added).**

Contrary to the above Rule, Defendant Judge Day asked Defendant Attorney Fudge if he would invoke "**The Rule**" and Defendant Attorney Fudge said "yes". Defendant Judge Day then ordered the group, including

Mrs. Minor, to leave the courtroom. However, Individual Defendant Belohlavy was allowed to stay in the courtroom.

Defendant Companies filed with The Court a Supplement To Defendants' Plea in Abatement and Brief in Support of Same on October 22, 1992, **one day** prior to the October 23, 1992 Hearing, rather than **seven days** prior to the Hearing in accordance with Rule 166b(4) of the Texas Rules of Civil Procedure, therefore rendering the pleading defective. Plaintiff had received no knowledge or notice, constructive or actual, of said Supplement on the day of the Hearing. Attached hereto as "Exhibit A" is a true copy of the transmittal letter and Page 1 of copy of Supplement To Defendant's Plea In Abatement And Brief In Support of Same from R. Lynn Fielder to Clerk of County Court at Law No. 4 show the date of filing of said document.

Rule 166b(4) of the Texas Rules of Civil Procedure states that:

> **... any evidence necessary to support such claim either in the form of affidavits [must be] served at least seven days before the hearing ...** (emphasis added).

At least twice during the hearing on October 23, 1992, Defendant Judge Day chided attorneys for filing

their pleadings late. He told one attorney who had filed his papers **three** days before the hearing "that's not how we do things".

However, Defendant Judge Day signed an Order on October 23, 1992 (the day of the Hearing) granting Defendants the Plea In Abatement, notwithstanding the fact that Defendant Companies' Supplement was filed **one day before the hearing which was** the basis of their argument at the Hearing.

X.

Defendant Attorneys failed to conference with Plaintiff regarding their intention to file Defendants' Supplement To Plea In Abatement according to Rule 166b(7) of the Texas Rules of Civil Procedure. Rule 166b(7) states:

> **"Discovery Motions. All discovery motions shall contain a certificate by the party filing same that efforts to resolve the discovery dispute without the necessity of court intervention have been attempted and failed."**

Attached hereto as "Exhibit B" is a true copy of the Order On Plea In Abatement signed by Defendant

Judge Day on October 23, 1992.

During the October 23, 1992 Hearing, Defendant Judge Day proceeded to define and distinguish the difference between a "formal hearing" and a "deposition hearing". Plaintiff had, as part of his written interrogatories to Defendant Companies, requested Defendant Companies to define a "formal hearing" and a "deposition hearing". Defendant Companies have failed and refused to answer these interrogatories. However, Defendant Judge Day told Plaintiff during the hearing that:

> **a 'formal hearing' and a 'deposition hearing' are one and the same. That is why insurance companies have a deposition hearing so they can use it during a trial.**

Plaintiff filed a Motion to Quash both Defendants' Plea In Abatement and Supplement To Plea In Abatement. Plaintiff requested a hearing on his motion to quash both **Defendants' Plea In Abatement** because it was based on an incorrect or untrue sworn affidavit by Individual Defendant Belohlavy (agent for Allstate) and the **Supplement To Defendants' Plea In Abatement** because it was defective due to untimely filing, and the absence of a certificate of conference.

XI.

During the October 23, 1992 Hearing, Defendant Judge Day **did not hear** Plaintiff's Motion for Imposition of Sanctions For Abuse Of Discovery Process against Defendant Companies. The only reference made to Sanctions was that, as Defendant Judge Day was flipping through the file, he asked Plaintiff, in a somewhat disparaging manner, "what do you know about sanctions?"

Notwithstanding, Defendant Attorney Fudge, after being served with Plaintiff's Motion to Quash the defective pleadings, filed an Order on November 2, 1992 with The Court which stated that Plaintiff's Motion for Sanctions was **heard** and **ruled** on by the Judge on October 23, 1992, the day of the hearing.

Nevertheless, Defendant Judge Day signed Defendant Companies' Order on November 2, 1992, **the same day** the order was filed with The Court although Plaintiff's Motion on Imposition of Sanctions For Abuse Of Discovery Process **was not heard or ruled on** by Defendant Judge Day at the October 23, 1992 Hearing. Attached hereto are: 1. as "Exhibit C" is a true copy of the Order denying Plaintiff's Motion for Sanctions signed by Defendant Judge Day on October 23, 1992, and 2. as "Exhibit D" is true copy of Plaintiff's Motion on Imposi-

tion of Sanctions For Abuse Of Discovery Process.

XII.

Plaintiff moved The Court to quash Defendant Companies' request for an Order to deny Plaintiff's Motion For Sanction before The court, because:

1. The Court **did not hear** Plaintiff's Motion; and

2. Defendant Judge Day's Order was in reference to a nonexistent motion entitled "**Plaintiff's Motion For Sanction**" instead of "**Plaintiff's Motion For Imposition of Sanction For Abuse of Discovery Process**" filed in The Case.

XIII.

Because of Defendant Judge Day's apparent bias and prejudice, Plaintiff filed Plaintiff's Motion to Recuse Judge on November 10, 1992 pursuant to Rule 18a(a) of the Texas Rules of Civil Procedure.

On November 11, 1992, Defendant Judge Day returned to Plaintiff the unsigned Order which was presented with the Motion To Recuse, along with a request for Plaintiff to submit a Fiat to The Court in order to obtain a hearing on Plaintiff's Motion to Recuse.

Plaintiff expected that the Fiat would be sent to the First Administrative Judicial Region for action by the Presiding Judge.

On November 12, 1992, in response to Defendant Judge Day's request, Plaintiff filed a Fiat to obtain a hearing on his Motion to Recuse Judge.

On November 12, 1992 Defendant Judge Day, **himself**, set Plaintiff's Motion to Recuse Judge for hearing on December 4, 1992, at 9:00 A.M. in The Court. Attached hereto as "Exhibit E" is a true copy of the Fiat setting Plaintiff's Motion To Recuse Judge for hearing on December 4, 1992 signed by Defendant Judge Day.

On November 13, 1992 Defendant Attorneys filed for Defendant Companies the following:

a) Defendants' Response To Plaintiff's Numerous Motions Currently On File And Defendants' Motion For Sanctions,

b) Response To Plaintiff's Motion To Recuse Judge, and

c) Defendant's Motion For Sanctions For Improper And Frivolous Recusal Motion.

On November 17, 1992 Plaintiff received a letter

from Defendant Attorney Fudge advising him that Defendant Judge Day had set for hearing, Defendant Companies' Motions for Sanctions for December 4, 1992 in The Court. Attached hereto as "Exhibit F" is a true copy of letter from Defendant Attorney Fudge.

On November 17, 1992 Plaintiff called The Court and requested that the Hearing on Plaintiff's Motion to Quash be postponed because of the filing of Plaintiff's Motion to Recuse Judge.

On November 24, 1992 Plaintiff received a copy of a letter signed by Defendant Judge Day addressed to Judge Pat McDowell, advising him that Judge Charles E. Sherrill, Jr. (a Judge Day's appointee, contrary to Rule 18a(a) of the Texas Rules of Civil Procedure) would hear the Motion to Recuse on Friday, December 4, 1992 at 9:00 A.M. in Defendant Judge Day's Court. Attached hereto as "Exhibit G" is a true copy of letter to Defendant Judge McDowell from Defendant Judge Day.

On November 24, 1992, Plaintiff wrote Defendant Judge McDowell, informing him of Defendant Judge Day's actions and requested that his office look into the matter and set a hearing date on Plaintiff's Motion to Recuse Judge.

On December 7, 1992, Defendant Judge Day

wrote Defendant Judge McDowell asking him to appoint someone to hear the Motion To Recuse, and stated that he had assumed that visiting Judge Charles E. Sherrill Jr. would have heard the Motion To Recuse on December 4, 1992. Attached hereto as "Exhibit H" is a true copy of letter to Defendant Judge McDowell from Defendant Judge Day.

On December 8, 1992, the **Local Administrative Judge** signed an Order transferring Plaintiff's case from County Court at Law No. 4 to County Court at Law No. 1 **without a Hearing**, contrary to Rule 18a(a) of the Texas Rules of Civil Procedure. Attached hereto as "Exhibit I" is a true copy of Order entered by the Local Administrative Judge.

On December 18, 1992, Wanda Collins, Deputy County Clerk of Dallas County, signed a Notice setting Plaintiff's case for Trial on February 1, 1993 at 9:00 A.M., although the case was still in the discovery phase of the lawsuit. Attached hereto as "Exhibit J" is a true copy of Notice from Wanda Collins.

On January 12, 1993, Plaintiff wrote a followup letter to Defendant Judge McDowell regarding Plaintiff's Motion To Recuse Judge in The Case pursuant to Rule 18a(a) of the Texas Rules of Civil Procedure, and asked him to appoint a Judge to hear this Motion and set a

hearing date pursuant to Section 74.056 of the Texas Government Code.

On January 14, 1993, Defendant Judge McDowell entered an Order stating that:

> a) "Plaintiff's Motion to Recuse having been filed and it appearing that the trial court **has not voluntarily recused himself** and a hearing is necessary to determine the merits of the Motion to Recuse; (Emphasis Added)
>
> b) "it is the Order of the Presiding Judge of the First Administrative Judicial Region that styled and numbered cause CC-92-05587-D **shall be returned to County Court at Law No. Four of Dallas County, after which a Judge shall be assigned by the Presiding Administrative Judge of the First Administrative Judicial Region** to hear and determine the merits of the Motion to Recuse; and (Emphasis Added)
>
> c) "it is further ordered that any other orders concerning the Motion to Recuse or transfer of this cause are dissolved and held for naught, and that any other orders made after the Motion to Recuse was filed are set

aside pending hearing on the Motion to Recuse."

Attached hereto as "Exhibit K" is a true copy of Defendant Judge McDowell's Order.

XIV.

On page 7 of Defendant Companies' and Individual Defendants' Response to Plaintiff's Numerous Motions Currently on File And Defendants' Motion For Sanctions, Defendant Attorney Fudge, stated that Plaintiff "**fancies himself an attorney**". This statement conveys a message that Defendant Law Firm and Defendant Attorneys are biased against parties who are "pro se" as does Defendant Judge Day who in reference to his sarcastic statement made on October 23, 1992, that Plaintiff had better get a lawyer. These statements, by officers of Dallas County Court system, seem to imply that there is a strong probability that "pro se" parties run the risk of not getting a fair trial, thus depriving "pro se" parties of due process. Attached hereto as "Exhibit L" is a true copy of pages 6, 7, and 8 of Defendant Companies' and Individual Defendants' Response to Plaintiff's Numerous Motions Currently on File And Defendants' Motion For Sanctions.

XV.

Upon information and belief, as of the filing of this **Plaintiff's Original Complaint**:

1. Defendant Judge Day has not yet presented the Motion to Recuse Judge to the First Administrative Judicial Region as Rule 18a(d) of the Texas Rules of Civil Procedure requires;

2. Defendant Judge Day had attempted twice to set a hearing for said Motion in The Court for December 4, 1992;

3. Defendant Judge Day had appointed a Judge to hear the Motion; and

4. Defendant Judge Day had set a hearing for Defendants' Response To Plaintiff's Numerous Motions Currently On File And Defendants' Motion For Sanctions **subsequent** to the Motion for Recusal.

The preceding actions by Defendant Judge Day are contrary to Rule 18a(d) of the Texas Rules of Civil Procedure, and demonstrate a blatant disregard for Texas procedural rules, and by so doing, Defendant Judge Day has deprived Plaintiff of due process of law under the Constitution of the United States, and has discriminated against Plaintiff because of race, and against Plaintiff, as Plaintiff, Pro Se.

XVI.

Rule 18a(d) of the Texas Rules of Civil Procedure states:

> ... The presiding judge of the administrative judicial district shall **immediately** set a hearing before himself or some other judge designated by him, **shall cause notice of such hearing to be given to all parties or their counsel**, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require. (Emphasis Added)

Defendant Judge McDowell has not yet complied fully with Rule 18a(d) in the following manner:

1. Defendant Judge McDowell did not **immediately** set a hearing when he became aware that Defendant Judge Day had failed to comply with Rule 18a of the Texas Rules of Civil Procedure. Defendant Judge McDowell's Order was entered on **January 14, 1993** setting aside all actions taken by both Defendant Judge Day and the Local Administrative Judge, **after** Plaintiff's Motion to Recuse Judge was filed on No-

vember 10, 1992. Defendant Judge McDowell's Order of Assignment was not entered until **February 26, 1993 and only after Defendants Attorneys' letter to him of February 16, 1993** enquiring about the setting of a hearing on Plaintiff's Motion To Recuse. Attached hereto as "Exhibit M" is a true copy of Defendant Attorney's letter to Defendant Judge McDowell dated February 16, 1993.

2. Defendant Judge McDowell did not cause notice of said Order of Assignment to be given to Plaintiff.

3. Notice of his Order of Assignment was not given to Defendant Attorneys either as indicated by their letter to Judge H. G. Andrews dated March 4, 1993. Attached hereto as "Exhibit N" is a true copy of Defendant Attorney's letter to Judge H. G. Andrews.

4. Defendant Judge McDowell did not set a hearing date in his Order of Assignment of Judge Andrews to hear the Motion To Recuse entered February 26, 1993 pursuant to Section 74.056 of the Texas Government

> Code. Attached hereto as "Exhibit O" is a true copy of Defendant Judge McDowell's Order of Assignment. A hearing date was set **only after** Defendants Attorneys' letter to Defendant Judge McDowell dated April 22, 1993. Attached hereto as "Exhibit P" is a true copy of Defendant Attorney Fudge's letter to Defendant Judge McDowell.

These actions send a clear signal that a "pro se" will not be afforded the curtesy or attention provided by law and Defendant Judge McDowell has demonstrated that by appointing a judge, and setting a hearing **only** after receiving letters of enquiry from Defendant Attorneys.

XVII.

Section 1 of the Civil Rights Act of 1866 and 42 USC Section 1981 provide that:

> "(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like

punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

"(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law."

XVIII.

Defendant Law Firm and Defendant Attorneys, on behalf of Defendant Companies and Individual Defendants, have attempted to create bias against Plaintiff, Pro Se with each judge connected with The Case as follows:

1. When Dallas County local administrative judge transferred The Case from County Court at Law No. 4 to County Court at Law No. 1 (though action by the Presiding Judge of the First Administrative Judicial Region was still pending pursuant to Rule 18a(a) of the Texas Rules of Civil Procedure), Defendant Attorney

Fielder wrote to Judge Richard Johnson of County Court at Law No. 1. The contents of his letter would lead one to believe that his motivation was to create bias against Plaintiff, Pro Se.

2. On February 16, 1993, Defendant Attorney Fudge wrote Defendant Judge McDowell asking him if there was anything **he needed to do** to request that a hearing be scheduled on Plaintiff's Motion to Recuse. The motion filed was Plaintiff's Motion to Recuse, Defendant Attorney has no role under Rule 18a(a) to assume the role of Plaintiff.

3. On March 4, 1993, Defendant Attorney Fudge wrote Judge H. G. Andrews, Jr. at his home in Rockwall, Texas as follows:

> "Sandy Hughes of Judge McDowell's office has informed me that you will be conducting a hearing on Plaintiff's Motion to Recuse Judge Day in the above referenced cause of action. On behalf of the Defendant, I would like to request that a hearing be set on this matter as soon as possible. Please contact me or my secretary, Cynthia, if any additional information or any additional steps are needed to have this matter scheduled for hearing."

4. On April 22, 1993, Defendant Attorney Fudge wrote Defendant Judge McDowell as follows:

> Welcome back to Dallas. ... Sandy Hughes had previously informed me that you had appointed Judge H.G. Andrews, Jr., to conduct a hearing on Plaintiff's Motion To Recuse. By letter dated March 4, 1993, a copy of which is attached hereto, I requested that Judge Andrews contact me to schedule a hearing on this motion. As of this date, I have not heard from Judge Andrews concerning this matter."
>
> "Please let me know if there is anything more I can do to get a hearing scheduled on Plaintiff's Motion To Recuse so that we can get this matter behind us and get on with this case ..."

XIX.

Defendant Judge Day has, by his bias against Plaintiff, as Plaintiff "pro se", **denied Plaintiff of the "fundamental fairness" doctrine guaranteed by the 5th and 14th Amendments of the United States Constitution; discriminated against Plaintiff in depriving Plaintiff of his civil rights based on race; discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice guaranteed by the 6th Amendment of the United States**

Constitution; restraint of trade by Defendant Judge Day against Plaintiff because Plaintiff chose to represent himself as Plaintiff, "pro se" in The Case; and the misuse and abuse of constituted authority as a Dallas County judge, and in depriving Plaintiff of his civil and constitutional rights Defendant Judge Day has therefore inflicted emotional distress and mental anguish on Plaintiff and denied him due process in getting a fair and unbiased trial in a Texas court.

Defendant Judge McDowell, by his inordinate, indefensible and unnecessary delay and inaction, has **deprived Plaintiff of a just and speedy trial of his lawsuit, needless increase in the cost of litigation, and deprived Plaintiff of due process and equal protection under the Constitutions of the United States and the State of Texas; discriminated against Plaintiff in depriving Plaintiff of his civil rights based on race; discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice; restraint of trade by Defendant against Plaintiff because Plaintiff chose to represent himself as Plaintiff, Pro Se in The Case; and the misuse and abuse of constituted authority as a Texas judge and Presiding Judge of the First Administrative Judicial Region.**

XVIII.

State courts bear equal responsibility with federal courts to guard and protect rights secured by the Constitution of the United States. This protection includes all races of people within the United States.

The State of Texas, through its State Commission on Judicial Conduct, dismissed Plaintiff's complaint against Defendant Judge Day, despite the evidence that Defendant Judge Day had blatantly disregarded Rules 166b(4), 166b(7), 267, and 18a of the Texan Rules of Civil Procedure and the 5th, 6th and 14th Amendments of the United States Constitution in violating Plaintiff's constitutional rights.

Defendant Judge McDowell failed to set a hearing date in his Order of Assignment of Judge H. G. Andrews, Jr. to hear Plaintiff's Motion To Recuse. The State of Texas, through Justices Joe Burnett and Will Barber of the Fifth District Court of Appeals of Texas at Dallas, denied a rehearing on Plaintiff's Petition for Writ of Mandamus to compel Defendant Judge McDowell to set a hearing date for Plaintiff's Motion To Recuse Judge.

Dallas County's Local Administrative Judge transferred Plaintiff's case, CC-92-05587-D, from Dallas County Court At Law No. 4 to Dallas County Court At Law No. 1 on December 8, 1992 and ordered Dallas

County Deputy Clerk to set The Case for hearing without legal authority.

The Texas courts have violated the responsibility to guard and protect Plaintiff's rights secured by the Constitution of the United States in The Case.

Plaintiff respectfully requests a trial by jury.

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays that the Defendants be cited to appear and answer herein, and that upon final hearing hereof Plaintiff have and recover from Defendants judgment of Twenty-Five Million ($25,000,000.00) Dollars for violating Plaintiff's **civil liberties; depriving Plaintiff of his due process** under the Constitutions of the United States and the State of Texas; **discrimination in depriving Plaintiff of his civil rights based on race**; **discrimination in depriving Plaintiff of his constitutional rights to counsel of one's choice**; and **restraint of trade** by Defendants against Plaintiff because Plaintiff chose to represent himself as Plaintiff, Pro Se in the Cause of Action styled Edward H. Minor vs. Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy, filed in Dallas County Court No. 4 (CC-92-05587-D); the **misuse and**

abuse of constituted authority as Texas judges and officers of the Court, and Presiding Judge of the First Administrative Judicial Region on the part of Defendant District Judge McDowell; plus all damages proved, cost of Court, prejudgment interest and interest from the date of judgment until same is paid, reasonable attorney's fees, legal fees and expenses, and for such further and other relief to which Plaintiff may be entitled.

Respectfully submitted,

/s/ Edward H. Minor

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Plaintiff, Pro Se
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11076

EDWARD H. MINOR,
Plaintiff-Appellant,

v.

STATE OF TEXAS, ET AL,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE NORTHERN DISTRICT
OF TEXAS, DALLAS DIVISION

BRIEF OF APPELLANT

Edward H. Minor
Pro Se
Post Office Box 101
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Dallas, Texas 75221
(214) 371-0745

CERTIFICATE OF INTERESTED PERSONS

The undersigned, Plaintiff-Appellant, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Judges of this honorable Court may evaluate possible disqualification or recusal.

Edward H. Minor, Appellant

State of Texas, Appellee

Pat McDowell, Appellee

Dallas County, Appellee

Robert E. Day, Appellee

Allstate Insurance Company, Appellee

Allstate Property And Casualty Company, Appellee

Allstate Texas Lloyd's Insurance Company, Appellee

Wayne E. Hedien, Appellee

Raymond H. Kiefer, Appellee

David B. Winn, Appellee

Gary E. Briggs, Appellee

Jane Elliott, Appellee

A. J. Belohlavy, Appellee

Fisk & Fielder, P.C., Appellee

R. Lynn Fielder, Appellee

Jeff D. Fudge, Appellee

Andrews & Kurth, Attorneys for the Allstate Appellees

Robert B. Weathersby, Bernard H. Masters and Dennis N. Ryan, Attorneys with Andrews & Kurth

Dolena T. Westergard and Peter Harlan, Assistant District Attorneys, Dallas County, Attorneys for Appellees Dallas County and Robert E. Day

Louis V. Carrillo, Assistant Attorney General, State of Texas, Attorney for Appellee Pat McDowell

/s/ Edward H. Minor
Edward H. Minor
Appellant, Pro Se

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REQUEST FOR ORAL ARGUMENT

Appellant does not request oral argument. Appellant believes that the argument set forth in this Brief is sufficient to clarify the issues presented by this Appeal.

INTRODUCTION

Presented before this Honorable Court today is a case that goes beyond the legal arguments presented for consideration. This case is not merely about an insurance payment. This matter also addresses one of the social ills pervasive in our society--racial prejudice and class bias. We, the citizens of this nation, must look to the courts of America to uphold the tenets of the Constitution of the United States. A citizen must not be judged based upon the color of his skin or his social and economic status or the lack thereof, but rather on the honest interpretation of the law.

This Honorable Court is respectfully requested to address the fundamental question of whether each and every citizen of these United States has an equal right to justice and equality regardless of his or her race, color, creed, or national original. The Defendant-Appellees Day, McDowell, Dallas County, State of Texas, Allstate, et al, and even the trial judge, by their actions infer dissent.

Plaintiff-Appellant seeks just, fair and equal treatment which Dallas County Court, Texas State courts and the federal trail court have all failed to do.

The tribunals of this Country shall not only be impartial in the controversies submitted to them but shall give assurance that they are impartial, free from any bias or prejudice that might disturb the normal course of impartial judgment. Anderson v. Sheppard (1988, CA 6 Mich) 856 F.2d 741.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. 28 USCS § 1654.

On May 6, 1993, Plaintiff-Appellant ("Appellant") filed his Original Complaint (the "Complaint") against State of Texas, et al for violations of Appellant's civil and constitutional rights pursuant to 42 U.S.C. § 1981, subsequent Amendments, and the 5th, 6th and 14th Amendments of the Constitution of the United States.

The Defendants-Appellees discriminated against Plaintiff-Appellant in depriving Appellant of his civil rights based on race; discriminated against Plaintiff in depriving Appellant of his constitutional rights to counsel of one's choice; and discriminated against Plaintiff because Appellant is "pro se" and thus, restraint of trade in the cause of action styled Edward H. Minor vs.

Allstate Insurance Company, et al. filed in Dallas County Court No. 4 (CC-92-05587-D). Plaintiff-Appellant contends that Defendants conspired to deprive him of rights guaranteed to all citizens of the United States by the Constitution and laws of the United States.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Did the trial court err in dismissing Appellant's complaint against Appellee Pat McDowell on the grounds of judicial immunity notwithstanding the fact that "it is surely not a judicial act ... It is merely a ministerial act"?

(2) Did the trial court err in dismissing Appellant's complaint against Appellee Robert E. Day on the grounds of judicial immunity?

(3) Did the trial court err in dismissing Appellant's complaint against Appellee Dallas County on the grounds that Plaintiff made no allegations attributable to Dallas County?

(4) Did trial court err in dismissing Appellant's complaint against the "so called" private Allstate Defendants, Allstate Employees Defendants, Fisk & Fielder, P.C., R. Lynn Fielder, and Jeff D. Fudge, as classified by the trial judge?

(5) Did the trial court err in dismissing Appellant's complaint against the State of Texas by pleading the Eleventh Amendment, **on behalf of the State of Texas**, notwithstanding the fact that the State of Texas failed to plead or raise a defense under the

Eleventh Amendment doctrine?

(6) Should the trial judge breach role of impartiality by:

a) making a personal comment that "His allegations against the private defendants are wholly conclusory, having no basis save for Plaintiff's imagination"? and,

b) dismissing Appellant's action under the Eleventh Amendment doctrine notwithstanding the fact that Appellee State of Texas failed to plead Eleventh Amendment as a defense?

(7) Did the appearance of the Attorney General of the State of Texas and the District Attorney of Dallas County, as counsel, in anyway prejudice the trial judge's decision in this case?

(8) Did trial court err in not addressing the issue of personal liability of Pat McDowell, Robert E. Day, R. Lynn Fielder, Jeff D. Fudge, Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy?

STATEMENT OF THE CASE

(1) Statement of Jurisdiction

Jurisdiction is founded on the violation of Plaintiff-Appellant's civil rights pursuant to 42 U.S.C. § 1981 and subsequent amendments, the 5th, 6th and 14th Amendments of the United States Constitution, and the requisite jurisdictional amount.

(2) Statement of Proceeding and Disposition in the Court Below

This is a civil rights action. Suit was filed against a Texas administrative judge, a Dallas County judge (state employees), the State of Texas, Dallas County, the Allstate defendants, the law firm of Fisk & Fielder, PC, R. Lynn Fielder and Jeff D. Fudge on May 6, 1993, pursuant to 42 U.S.C. § 1981, subsequent Amendments, and the 5th, 6th and 14th Amendments of the Constitution of the United States.

Section 1 of the Civil Rights Act of 1866 and 42 USC Section 1981 provide that:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by

white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Plaintiff complained that these Defendants, in concert with each other, have violated Plaintiff's **civil liberties; deprived Plaintiff of due process** under the Constitutions of the United States and the State of Texas; **discriminated against Plaintiff in depriving Plaintiff of his civil rights based on race**; **discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice**; and **the restraint of trade** by Defendants against Plaintiff because Plaintiff chose to represent himself as Plaintiff, Pro Se in the Cause of Action styled **Edward H. Minor** vs. **Allstate**

Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy, filed in Dallas County Court At Law No. 4 (CC-92-05587-D).

The defendants conspired to deprive and did deprive him of his federally secured rights under the Constitution of the United States.

On June 7, 1993 Plaintiff-Appellant served Plaintiff's First Request For Admissions and Plaintiff's First Set of Interrogatories on the respective Defendants.

The Defendants-Appellees, except Defendant-Appellee State of Texas, filed Motions for Protective Orders and Motions To Dismiss. By Court's orders of Reference filed June 21, 1993 and July 9, 1993, United States Magistrate Jane J. Boyle heard and granted on a "whole-sale" basis the Protective Order Motions to all of the defendants on July 6, 1993 and July 30, 1993 respectively. However, at the hearing on July 30th, Magistrate Boyle made a pointed statement to Plaintiff that she had not read Plaintiff's response filed in his Motion to Quash; notwithstanding Magistrate Boyle still ruled on the Motions and granted the Defendants their motions for protective order.

On July 28, 1993, **two days prior to the hearing set by Magistrate Boyle, the Court granted**, on a "wholesale" basis, all of the defendants' motion to dismiss, and denied, on a "wholesale" basis, Plaintiff's responses and motions to quash.

(3) Statement of Facts

The Allstate Defendants-Appellees issued to Plaintiff-Appellant under Number 216689137 a policy of insurance known as a homeowners insurance policy, which policy contained a clause known as the "Standard Homeowners Policy" clause, and which insurance policy was in full force and effect with all premiums paid at the time, between December 23, 1989 and January 9, 1990, when Plaintiff-Appellant's residence was burglarized by some unknown person or persons.

Plaintiff-Appellant properly filed claim of loss with Defendants-Appellees Allstate. Defendants-Appellees Allstate refused and have continued to refuse to settle Plaintiff-Appellant's claim, claiming that Plaintiff-Appellant failed to appear for, **what was constructively by the elements thereof, a "deposition hearing" which they called a "formal hearing"** and consequently asserted that Plaintiff-Appellant may be guilty of "concealment fraud". As a result of Defendant Companies' actions, Plaintiff has been denied homeowners policy insurance from other

companies and has suffered emotional anguish and financial loss.

Plaintiff-Appellant sued the Allstate Defendants-Appellees to compel them to settle his claims in Dallas County Court At Law No. 4 on June 30, 1992. The details of the matter are fully outlined in Plaintiff's Original Complaint.

ARGUMENT AND AUTHORITIES

I.

Defendant-Appellee State of Texas

Did the trial court err in dismissing Appellant's complaint against the State of Texas by pleading the Eleventh Amendment, **on behalf of the State of Texas**, notwithstanding the fact that the State of Texas failed to plead or raise a defense under the Eleventh Amendment doctrine?

In Griffin v. Breckenridge (1971) 403 US 88, 29 L.Ed 2d 338, 91 S.Ct 1970, 9 BNA FEP Cas 1196, the Supreme Court, interpreting 42 USC § 1985(3), determined that the statue reaches purely private conspiracies aimed at interfering with rights constitutionally protected against private, as well as official, encroachment, observing that the language of the provision referring to depriv-

ation of "equal protection" or of "equal privileges and immunities" does not require that the action working the deprivation come from the state. The Court in a subsequent decision held that an alleged conspiracy to infringe First Amendment rights is not actionable under 42 USC § 1985(3) unless it is demonstrated that the state is involved in the conspiracy or that the aim of the conspiracy is to influence the activity of the state. United Brotherhood of Carpenters & Joiners, Local 610 v. Scott (1983) 463 US 825, 77 L.Ed 2d 1049, 103 S.Ct 3352, 113 BNA LRRM 3145, 32 CCH ¶ 33697, 97 CCH LC ¶ 10231 and reh den 464 US 875, 78 L.Ed 2d 186, 104 S.Ct 211, 32 CCH EPD ¶ 33829.

The State of Texas was involved in the conspiracy to deprive Plaintiff-Appellant of a right guaranteed by the US Constitution - **Plaintiff-Appellant's civil liberties; deprived Plaintiff-Appellant of due process, discriminated against Plaintiff-Appellant in depriving Plaintiff-Appellant of his civil rights based on race; discriminated against Plaintiff-Appellant in depriving Plaintiff-Appellant of his constitutional rights to counsel of one's choice; and the restraint of trade.**

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. 28 USCS § 1654.

The State of Texas, through Justices Joe Burnett and Will Barber of the Fifth District Court of Appeals of Texas at Dallas, denied a rehearing on Plaintiff's Petition for Writ of Mandamus to compel Defendant McDowell to set a hearing date for Plaintiff's Motion To Recuse Judge.

The State of Texas, through Pat McDowell, Administrative Judge, First Administrative Judicial Region, was prejudiced and biased against Plaintiff based on his race and "pro se" status, took more than forty days to assign a judge.

The State of Texas, through its State Commission of Judicial Conduct, dismissed Plaintiff's complaint against Defendant Judge Day, despite the evidence indicating that Defendant Judge Day had blatantly disregarded Rules 166b(4), 166b(7), 267, and 18a of the Texas Rules of Civil Procedure depriving Plaintiff of his constitutional rights as guaranteed by the 5th, 6th and 14th Amendments of the U.S. Constitution.

The State of Texas' employee Pat McDowell and state court judge Robert E. Day, by their actions, show that there was a conspiracy among Allstate Insurance Company; its attorneys, Defendant Attorneys Fielder and Fudge; and these State employees, Defendant Judge Day and Defendant Judge McDowell to deprive Plaintiff of due

process because Plaintiff is African-American and "pro se" in The Case.

The Griffin case also states that in order to be actionable under 42 USCS § 1985(3), a Conspiracy must be motivated by some racial, or perhaps otherwise class-based, insidiously discriminatory animus, so that the status will not be interpreted as a general federal tort law. Santistevan v. Loveridge (1984, CA10 Colo) 732 F.2d 116.

Plaintiff has sufficiently demonstrated in his Original Complaint the facts that would tend to show that the Defendants worked in collaboration to conspire, and such conspiracy was motivated by racial prejudice and because Plaintiff is Plaintiff, pro se, which is class-based. Plaintiff-Appellant attached numerous exhibits to the Original Complaint to indicate that these Defendants did conspire against him.

The State of Texas failed to plead or raise a defense under the Eleventh Amendment doctrine upon which Plaintiff-Appellant's action against it was dismissed by the trial judge. Appellee State of Texas also failed to plead that it did not consent to this suit. **Appellee State of Texas simply pleaded improper and untimely service as grounds for dismissal of Appellant's case**.

Appellee State of Texas, by not pleading the defense

of Eleventh Amendment or consent to suit, waived its rights to such defense.

II.

Defendant-Appellee Pat McDowell

Did the trial court err in dismissing Appellant's complaint against Appellee Pat McDowell on the grounds of judicial immunity notwithstanding the fact that "it is surely not a judicial act ... It is merely a ministerial act"?

Pat McDowell was sued **personally** and as the **presiding judge of the First Administrative Judicial Region of Texas**. At no time did the trial court address the issue of Defendant McDowell as being sued personally.

At all times herein mentioned, Plaintiff dealt with Defendant Judge McDowell in his capacity as **an administrator** and not as **a judge**. Defendant Judge McDowell is a Judge of the Criminal District Court No. 5 of Dallas County, Texas. Plaintiff's case is **not** a criminal matter **but rather** a civil matter in Dallas County Court at Law No. 4 and his dealings with Defendant Judge McDowell relate to Plaintiff's motion to recuse Judge Robert E. Day.

Plaintiff's claims against Defendant Judge McDowell is not barred by the Eleventh Amendment as Defendant-

Appellee has pleaded. Plaintiff brought suit against Defendant as an **administrator over judges** and not as a **state court judge**. Defendant Judge McDowell is a Judge of the Criminal District Court No. 5 of Dallas County, Texas. Plaintiff's case is a civil matter in Dallas County Court at Law No. 4 and his dealings with Defendant Judge McDowell relate to Plaintiff's motion to recuse Judge Robert E. Day and not in relation to a criminal case before Criminal District Court No. 5 of Dallas County, Texas.

Defendant is not entitled to qualified good faith immunity. In order for the Defendant to enjoy qualified immunity from liability for any damages asserted by Plaintiff, the action taken by the official must be in **good faith**. U.S. Constitution, Amendment Eleven; Anderson v. Stevas, 625 F.Supp. 1244 (D.D.C. 1985). At no time between November 20, 1992 and May 6, 1993 did the Defendant act in good faith toward Plaintiff. Defendant became aware that Judge Robert E. Day would not recuse himself as indicated by Defendant's Order dated January 4, 1993 setting aside all actions taken by both Judge Day and the Local Administrative Judge (copy of Defendant's Order is attached to Plaintiff's Original Complaint as an "Exhibit). Defendant McDowell did not enter his Order of Assignment until February 26, 1993, **more than 50 days thereafter**, and only after Defendants Attorney's

letter to Defendant McDowell of February 16, 1993 (copy of Defendant Attorney Fudge's letter is attached as an "Exhibit" to Plaintiff's Original Complaint).

A Motion to Recuse Judge was filed in Stephen A. Batman v. H.D. Vest, Inc. and Herb Vest, in the 95th Judicial District of Dallas County, No. 92-06302-D on **October 27, 1992**. Defendant McDowell entered his Order of Assignment on **October 29, 1992** with a hearing date, **only** two days after the Motion was filed (said Motion and Order of Assignment are attached as "Exhibits" to Plaintiff's Original Complaint). Plaintiff respectfully requests that Judicial notice be taken that in this case the Plaintiff was represented by an attorney and all the parties were Caucasians.

Although it was Plaintiff's Motion To Recuse Judge, the Defendant **only responded when requested to do so by the opposing attorneys in the lawsuit and not Plaintiff**, except for the instance when the local administrative judge of Dallas County, without proper legal authority, transferred Plaintiff's case from Dallas County Court at Law No. 4 to Dallas County Court at Law No. 1 and Plaintiff complained to Defendant McDowell.

Plaintiff's Complaint is not lacking the requisite factual specificity to abrogate Defendant's qualified immunity, and therefore Defendant's objection to Plaint-

iff's discovery and Motion For a Protective Order **should not be** sustained.

Plaintiff contends that Defendant is attempting to circumvent valid litigation procedures to avoid responding to Plaintiff's discovery requests by Defendant's Objection to Discovery and Motion for a Protective Order to thwart justice.

Defendant McDowell's judicial role as a **criminal court judge** is quite different from those as an **administrator** assigning judges to hear cases. A "Judge will not benefit from judicial immunity and will be exposed to liability for actions in the clear absence of all jurisdiction" Cintron Rodriguez v. Pagan Nieves, 736 F.Supp. 411 (D.Puerto Rico 1990); "Question of judicial immunity turns on court's authority over the subject matter and not personal jurisdiction over the parties before it." Id. Emswiler v. McCoy, 622 F.Supp. 786 (1985). "Judge who acts in clear absence of jurisdiction is not immune to civil suit." Maestri v. Jutkofsky, 860 F.2d 50, certiorari denied, 109 S.Ct. 1132, 489 U.S. 1016, 103 L.Ed.2d 193. The Court in Guercio v. Brody, 814 F.2d 1115, rehearing denied in part, 832 F.2d 166, has ruled that not all official acts of judges are cloaked with absolute immunity.

"Whether the act done by a judge was judicial or not

is to be determined by its character, and not by the character of the agent. The duty of appointing a judge to hear a motion might have well been committed by a private person as well as one holding the office of a judge. In such cases, it is surely not a judicial act ... It is merely a ministerial act." Id.

In his motion before the trial Court, Defendant cited McAlester v. Brown, 469 F.2d 1280, 1282 (5th Cir. 1972) to state the four factors the court should consider to determine whether the act of which plaintiff complains is a judicial act for the purposes of absolute judicial immunity. In the instant case, Defendant does not meet the test for the purposes of absolute judicial immunity as follows:

(1) Whether the precise act complained of is a normal judicial function.

The precise act complained of in Plaintiff's suit is **not** a normal judicial function. Defendant is **not** the presiding judge in The Case which is the basis of this lawsuit. Defendant **wears two hats**, a criminal district judge **and** an administrator over judges. Plaintiff's matter relates to Defendant's role as an administrator.

(2) Whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers.

Defendant has a separate office with a complete staff in a different building from which his duties as an administrator is administered. The two functions are well separated and unrelated to each another. All of Defendant's dealings with Plaintiff was transacted by the office at 600 Commerce Street, Sixth Floor and not at the offices of the Criminal District Court No. 5 of Dallas County.

(3) Whether the controversy centered around a case pending before the court.

The controversy in this suit is not centered around a case pending before the Criminal District Court No. 5 of Dallas County, Texas over which Defendant presides, **but** is a matter to recuse a judge in Dallas County Court at Law No. 4.

(4) Whether the acts arose directly out of a visit to the judge in his official capacity.

No acts by Defendant arose directly out of a visit to him as a criminal district judge. Plaintiff, at all times, dealt with Defendant as an **administrator** to assign a judge to hear his motion to recuse.

It is a well established doctrine that judicial immunity does not extend to a judge when **not acting** within the limits of his jurisdiction. A "Judge is immuned from liability for damages if he had jurisdiction over subject

matter and if acts complained of were judicial acts." Staples v. Edwards, 592 F.Supp. 763, Carter v. Rupracht, 532 F.Supp. 383, Weiss v. Feigenbaum, 558 F.Supp. 265.

When the judge's actions are **administrative in nature** he is not clothed with judicial immunity. Santiago v. City of Philadelphia, 435 F.Supp. 136, Ross v. Arnold, 575 F.Supp. 1494.

Finally, on **page 5 paragraph 3 of Defendant's Motion To Dismiss** it is stated as follows:

In the instant case, Plaintiff's cause of action alleges injury resulting from Defendant McDowell's actions in presiding over **her suit for wrongful foreclosure**, matter squarely within those functions normally performed by a judge. (Emphasis added)

Plaintiff would like to bring to the attention of this Honorable Court that this statement is clearly misleading and incorrect for the following reasons:

1. Defendant McDowell is a **criminal court judge** presiding over Criminal District Court No. 5 of Dallas County, Texas.

2. Plaintiff is a **male** and not a **female**.

3. It does not seem to Plaintiff that a crim-

> inal court hears a suit for wrongful foreclosure which is a civil matter.
>
> 4. Plaintiff's cause of action in this matter relates to the appointment of a judge to hear a motion to recuse and set a hearing date for said motion.

The appointment of a judge to hear recusal motions is not a function "normally performed by a judge".

Again, on page 6 paragraph 1 of Defendant's Motion To Dismiss, Defendant's attorney states the following:

> "Since Plaintiff has alleged that Defendant McDowell **presided over her foreclosure suit** and issued orders pursuant thereto, the exception to absolute immunity does not apply." (Emphasis added)

Plaintiff **is not a female** and has never alleged that Defendant McDowell presided over **his** foreclosure suit and issued orders pursuant thereto.

Pat McDowell's discriminatory actions against Appellant were racially and class-based motivated.

Plaintiff has stated a claim upon which relief can be granted against Defendant McDowell and the Plaintiff's claims against him should be sustained, therefore he is

not entitled to absolute judicial immunity.

III.

Defendant-Appellee Dallas County

Did the trial court err in dismissing Appellant's complaint against Appellee Dallas County on the grounds that Plaintiff made no allegations attributable to Dallas County?

Plaintiff's claim against Defendant Dallas County is that Dallas County has legal responsibility for its courts and the judges who preside over them. The County pays the judges' salaries and provides facilities and clerical staff, yet contends that it has no legal responsibility over its judges.

Dallas County's Local Administrative Judge transferred Plaintiff's case, CC-92-05587-D, from Dallas County Court At Law No. 4 to Dallas County Court At Law No. 1 on December 8, 1992 and ordered Dallas County Deputy Clerk to set The Case for hearing without legal authority.

Dallas County bears equal responsibility to protect and safeguard federal rights of all citizens of the United States. By the actions of Dallas County judges and deputy clerk, Plaintiff's constitutional rights of equal access to the court, fair treatment, and the restraint of

trade pursuant to the Sherman Act based on his race and pro se status were violated.

In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. 28 USCS § 1654.

The practice of law, in all of its aspects, is an "inter-state trade". On certiorari, the United States Supreme Court reversed and remanded of the decision the United States Court of Appeals for the Fourth Circuit, which held that the Virginia State Bar's actions were immune from the Sherman Act as constituting state action, and that the County Bar was also immune since the practice of law was not "trade or commerce" under the Act but was a "learned profession" exempt from the Act. (497 F.2d 1). The Supreme Court has affirmed that the State Bar's actions **were not immune** from the Sherman Act as constituting state action, and the County Bar was also not immune since the practice of law is "trade or commerce" under the Act, and therefore not exempt from the Act. In addition, the Court stated that the practice of law does substantially affect interstate commerce for purposes of the Sherman Act. The practice of law has sufficient effect on interstate commerce to support Sherman Act jurisdiction in any event. Goldfarb v. Virginia State Bar, 421 U.S. 773, 44 L.Ed 2d 572, 95 S.Ct 2004.

The law does recognize a claim against a County for actions pursuant to the violation of federal statute. Id.

IV.

Defendant-Appellee Robert E. Day

Did the trial court err in dismissing Appellant's complaint against Appellee Robert E. Day on the grounds of judicial immunity?

Appellee Day is not entitled to either absolute judicial immunity or qualified immunity for the following reasons:

A. Appellee Day was partial and openly showed his partiality.

1. Every litigant has a constitutional right to an impartial judge. Suggs v. C.W. Transport, Inc., 421 F.Supp. 58. An impartial tribunal is the sine qua non of a full and fair hearing. 42 U.S.C.A. § 1983, Kelley v. Action For Boston Community Development, Inc., 419 F.Supp. 511.

2. Judiciary should not only be impartial, but should always appear impartial. State of Cal. v. Kleppe, 431 F.Supp. 1344.

3. A litigant has a constitutional right not to be tried before a judge who is biased against him. Milligan v. Stone, 424 F.Supp. 1088, affirmed 548 F.2d 878,

certiorari denied 97 S.Ct. 2955, 432 U.S. 908, 53 L.Ed.2d 1081.

4. A court should show no bias toward wither party or even tend to become an advocate for either party. Franano v. United States (1962, CA 8 MO) 310 F.2d 533.

5. Bias may be shown by **in-court statements**. 28 U.S.C.A. §§ 144, 455, Browning v. Foltz, 837 F.2d 276, certiorari denied 109 S.Ct. 816, 488 U.S. 1018, 102 L.Ed.2d 805. At no time during Plaintiff's dealing with Judge Day did he demonstrate that he was not prejudiced and biased against Plaintiff. In all courts of the United States the parties may plead and conduct their own cases personally or by counsel. 28 USCS ⇔ 1654. A fair trial in a fair tribunal is a basic requirement of due process.

In order for the Defendant to enjoy qualified immunity from liability for any damages asserted by Plaintiff, the action taken by the official must be in **good faith.** US Constitution, Amendment Eleven; Anderson v. Stevas, 625 F.Supp. 1244 (D.D.C. 1985).

B. A "Judge will not benefit from judicial immunity and will be exposed to liability for actions in the clear absence of all jurisdiction" Cintron Rodriquez v. Pagan Nieves, 736 F.Supp. 411 (D.Puerto Rico 1990); "Question of judicial immunity turns on court's authority over

the subject matter and not personal jurisdiction over the parties before it." Id. Emswiler v. McCoy, 622 F.Supp. 786 (1985). "Judge who acts in clear absence of jurisdiction is not immune to civil suit." Maestri v. Jutkofsky, 860 F.2d 50, certiorari denied, 109 S.Ct. 1132, 489 U.S. 1016, 103 L.ED.2d 193. The Court in Guercio v. Brody, 814 F.2d 1115, rehearing denied in part, 832 F.2d 166, has ruled that not all official acts of judges are cloaked with absolute immunity. "Whether the act done by a judge was judicial or not is to be determined by its character, and not by the character of the agent." Id.

Once the Motion To Recuse Judge was presented to Judge Day, he no longer possessed jurisdiction over Plaintiff's case. Rule 18(a), Texas Rules of Civil Procedure. "Judge who acts in clear absence of jurisdiction is not immune to civil suit." Maestri v. Jutkofsky, 860 F.2d 50, certiorari denied, 109 S.Ct. 1132, 489 U.S. 1016, 103 L.Ed.2d 193.

It is prejudicial error for the trial judge to make remarks that make it evident that he harbors feelings of bias or hostility toward a party or his counsel.

V.

Defendants-Appellees Allstate Insurance Company; Allstate Property And Casualty Company Allstate Texas Lloyd's Insurance Company; Wayne E. Hedien; Raymond H. Kiefer; David B. Winn; Gary E. Briggs; Jane Elliott; A. J. Belohlavy; Fisk & Fielder, P.C., R. Lynn Fielder and Jeff D. Fudge

> Did trial court err in dismissing Appellant's complaint against the "so called" private Allstate Defendants, Allstate Employees Defendants, Fisk & Fielder, P.C., R. Lynn Fielder, and Jeff D. Fudge, as classified by the trial judge?

Plaintiff-Appellant has alleged that these defendants conspired with state officials in depriving him of his constitutional and civil rights. Liability, in federal civil rights action under 42 USCS § 1983, of private parties who conspire with officials who may be immuned. 44 ALR Fed 547.

Private parties may be reached in civil rights actions when private individuals and companies join with state officials to violate a person's constitutional rights. Jurisdiction may be conferred by 28 USCS § 1343(A)(3) over the private individual [Adickes v. S.H. Kress & Co. (1970) 398 US 144, 26 L.Ed 2d 142, 90 S.Ct 1598; Brooks v. Peters (1971, ED Win) 322 F.Supp 1273] even though the state official may be immune from suit.

Sparks v. Duval County Ranch Co. (1979, CA5 Tex) 604 F.2d 976, affd 449 US 24, 66 L.Ed 185, 101 S.Ct 183.

A private individual and/or company may be named in a civil rights action when the party has taken some action which has, in turn, triggered other action by state officials. Long v. Citizen's Bank & Trust Co. (1983, DC Kan) 563 F.Supp 1203.

The Supreme Court has held that the qualified immunity doctrine does not apply in suits brought against private individuals (non-public officials). Wyatt v. Cole, 112 S.Ct. 1827 (1992).

Specifically, Plaintiff's allegations against the Allstate Company and Allstate Individual Defendants Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy were that:

1. The Allstate defendants, by and through defendants Hedien, Kiefer, Winn, Briggs, Elliott, Belohlavy, Fisk & Fielder, P.C., Fielder, and Fudge, acted in concert with state officials to deprive plaintiff of his constitutional rights.

2. The Allstate Defendants hired the Law Firm of Fisk & Fielder, P.C. and Defendant Attorneys in particular, to represent them in The Case because of the apparent "special relationship" between the Law Firm and

Defendant Judge Day. The Fisk & Fielder law firm and its attorney, working on these Defendants' behalf attempted and succeeded in creating bias against Plaintiff with each judge connected with The Case because Plaintiff is African-American and appeared as Plaintiff Pro Se as follows:

a. When Dallas County local administrative judge transferred The Case from County Court at Law No. 4 to County Court at Law No. 1 (**though action by the Presiding Judge of the First Administrative Judicial Region was still pending pursuant to Rule 18a(a) of the Texas Rules of Civil Procedure**), Defendant Attorney Fielder wrote to Judge Richard Johnson of County Court at Law No. 1. The contents of his letter would lead one to believe that his motivation was to create bias against Plaintiff based on Plaintiff's race and because he is Pro Se.

b. On February 16, 1993, Defendant Attorney Fudge wrote Defendant Judge McDowell asking him if there was anything he needed to do to request that a hearing be scheduled on Plaintiff's Motion to Recuse. The motion filed was Plaintiff's Motion to Recuse and Defendant Attorney has no role under Rule 18a(a) to try to speed up the process.

c. On March 4, 1993, Defendant Attorney Fudge

wrote a letter to Judge H. G. Andrews, Jr. at his home in Rockwall, Texas which states as follows:

> Sandy Hughes of Judge McDowell's office has informed me that you will be conducting a hearing on Plaintiff's Motion to Recuse Judge Day in the above referenced cause of action. On behalf of the Defendant, I would like to request that a hearing be set on this matter as soon as possible. Please contact me or my secretary, Cynthia, if any additional information or any additional steps are needed to have this matter scheduled for hearing.

VI.

The Trial Court

Should the trial judge breach role of impartiality by:

a) making a personal comment that "His allegations against the private defendants are wholly conclusory, having no basis save for Plaintiff's imagination"? and,

b) dismissing Appellant's action under the Eleventh Amendment doctrine notwithstanding the fact that Appellee State of Texas failed to plead Elev-

enth Amendment as a defense?

Notwithstanding the numerous exhibits presented with Plaintiff's Original Complaint which showed the interaction by and among all of the defendants, the trial judge, in his Order dismissing Plaintiff-Appellant's lawsuit against the defendants, stated that Plaintiff-Appellant's "allegations against the private defendants are wholly conclusory, having no basis save for Plaintiff's imagination."

The State of Texas failed to plead or raise a defense under the Eleventh Amendment doctrine upon which the trial judge dismissed Plaintiff-Appellant's action against it. Appellee State of Texas also failed to plead that it did not consent to this suit. Appellee merely pleaded improper and untimely service as grounds for dismissal of Appellant's case. The Trial Judge, notwithstanding these facts, constructively "represented" Appellee State of Texas in his motion to dismiss, pleading Eleventh Amendment of the US Constitution.

The trial court stated in its motion to dismiss that "Because Minor is a pro se litigant, this Court provided him with an extension of time to serve properly the State of Texas." However, it is significant that the trial court, knowing that Minor was a pro se litigant, did not apprise him that the State of Texas was not properly served **until**

after the Appeals Court had dismissed Appellant's first appeal because, constructively, the trial court had refused to grant Plaintiff-Appellant's motion for default judgment **by ignoring said motion**, causing Appellant undue and unnecessary expense of litigation.

VII.

The Trial Court

Did the appearance of the Attorney General of the State of Texas and the District Attorney of Dallas County, as counsel, in any way prejudice the trial judge's decision to dismiss this case?

An action under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears to be a certainty that the plaintiffs are entitled to no relief under any state of facts which could be proved in support of their claims. Escalera v. New York City Housing Authority (1970, CA2 NY) 425 F.2d 853, cert den 400 US 853, 27 L.Ed 2d 91, 91 S.Ct 54; Mayberry v. Prasse (1971. CA3 Pa) 449 F.2d 1266; Garcia v. United States (1982, SD Tex) 538 F.Supp 814; Rogers v. Provident Hospital (1965, ND Ill) 241 F.Supp 633. Even a flawed complaint must be construed as to do substantial justice. Durham v. Parks (1983, DC Minn) 564 F.Supp 244.

When faced with a motion to dismiss, the court should give the pleadings of a pro se plaintiff especially lenient treatment. This means that before the court dismisses the complaint of a pro se plaintiff, the party should be given an opportunity to offer evidence, or to further particularize the claim. Walter v. Butkovich (1985, MD NC) 605 F.Supp 1137.

The trial court Magistrate, Jane Boyle ruled on motions at hearing for protective orders after stating, pointedly, that she had not read Plaintiff's responses and opposition to defendants' motions but she, nonetheless, ruled and granted defendants' motions for protective order.

VIII.

The Trial Court

Did trial court err in not addressing the issue of personal liability of Pat McDowell, Robert E. Day, R. Lynn Fielder and Jeff D. Fudge?

Plaintiff-Appellant sued Pat McDowell, Robert E. Day, R. Lynn Fielder and Jeff D. Fudge for acts they committed personally as a administrative judge, a state judge and officers of the State court. The trial court

failed to address the issue of personal liability of these Defendants in its Orders.

Rule 12(b)(6) of the Federal Rules of Civil Procedure regarding dismissals for failure to state a claim upon which relief can be granted are scrutinized with special care in civil rights actions. Gotkin v. Miller (1974, ED NY) 379 F. Supp 859, affd (CA2 NY) 514 F.2d 125; Dunleavy v. Ternullo (1976, SD NY) 410 F.Supp 1166; Westray v. Porthole, Inc. (1984, DC Md) 586 F.Supp 834; Azar v. Conley (1972, CA6 Ohio) 456 F.2d 1382; 15 FR Serv 2d 1179, later app (CA6 Ohio) 480 F2d 220; 17 FR Serv 2d 444; Westlake v. Lucas (1976, CA6 Mich) 537 F2d 857. The court must presume all factual allegations of the complaint to be true. Neitzke v. Williams (1989, US) 104 L.Ed 2d 338, 109 S.Ct 1827; Usher v. Los Angeles (1987, CA9 Cal) 828 F.2d 556. The court must draw all reasonable inferences in favor of the nonmoving party. Usher v. Los Angeles (1987, CA9 Cal) 828 F.2d 556. A fair trial in a fair tribunal is a basic requirement of due process.

Appellant contends that the trial court erred in not scrutinizing Plaintiff's pleadings with due care, diligence or interest when it granted defendants their motions to dismiss. The trial court was not free from bias or prejudice and therefore did not render an impartial judgment.

SUMMARY OF ARGUMENT

The complaint in an action under 42 USCS § 1981 is insufficient unless it alleges a deprivation of civil rights. Plaintiff complained that these Defendants, in concert with each other, have violated Plaintiff's **civil liberties; deprived Plaintiff of due process** under the Constitutions of the United States and the State of Texas; **discriminated against Plaintiff in depriving Plaintiff of his civil rights based on race**; **discriminated against Plaintiff in depriving Plaintiff of his constitutional rights to counsel of one's choice**; and **the restraint of trade** by Defendants against Plaintiff because Plaintiff chose to represent himself as Plaintiff, Pro Se in the Cause of Action styled **Edward H. Minor** vs. **Allstate Insurance Company, Allstate Property And Casualty Company, Allstate Texas Lloyd's Insurance Company Inc.; Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy**, filed in Dallas County Court At Law No. 4 (CC-92-05587-D).

The defendants conspired to deprive and did deprive him of his federally secured rights under the Constitution of the United States.

The two primary considerations for a court's analysis of the propriety of dismissal under Rule 12(b)(6) estab-

lished by the United States Court of Appeals for the Fifth Circuit were not followed by the trial judge. First, the trial court must accept as true all well pleaded facts in the complaint, and the complaint is to be liberally construed in favor of the plaintiff; however, the court will not accept conclusory allegations in the complaint as true. Kaiser Aluminum, 677 F.2d at 1050. Plaintiff documented with supporting exhibits the actions of the defendants, and supply legal authorities to support his claims against these defendants. However, the trial court did not accept as true the facts in the complaint, and they were construed in favor of the defendants. For instance, Defendants-Appellees Allstate, Fisk & Fielder, PC, R. Lynn Fielder and Jeff D. Fudge's Motion to Dismiss was filed under Rule 126(b)(6) instead of Rule 12(b)(6). Although Plaintiff filed a motion to quash that defective motion, the trial court denied Plaintiff's motion to quash. Second, a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts that would entitle it to relief. Plaintiff did prove that there was a conspiracy between and among the defendants to deprive Plaintiff of his constitutionally guaranteed rights because of his race and "pro se" status.

The trial judge dismissed the case two days before the hearing set by the Court regarding Defendants-Appellees'

Motions for Protective Order.

The trial court Magistrate ruled on motions at hearing for protective orders after informing Plaintiff that she had not read Plaintiff's responses and opposition to defendants' motions but she, nonetheless, granted the motions to the defendants.

It is prejudicial error for the trial judge to make remarks that make it evident that he harbors feelings of bias or hostility toward a party or his counsel.

Based upon the foregoing, it is clear that the Trial Court has erred in granting its "wholesale dismissal" of Plaintiff-Appellant's lawsuit. First, The Supreme Court's admonition that pro se civil rights complaints be construed more liberally than those drafted by lawyers, Tosta v. Hooks, 568 F.Supp 616, and that all pleadings shall be so construed as to do substantial justice, Campbell v. U.S. Navy, 567 F.Supp 356, did not have particular applicability in the Trial Court's decision in this case. Second, In order to maintain an action under 42 USCS § 1985, a party is not required to first exhaust administrative or state court remedies. Hazzard v. Wienberger (1974, SD NY) 382 F.Supp 225, affd without op (CA2 NY) 519 F.2d 1397; Prochaska v. Fediaczko (1978, WD Pa) 458 F.Supp 778; Burt v. New York ((1946, CA2 NY) 156 F.2d 791.

This Honorable Court is being petitioned to address whether there are any personal liability by these defendants for violation of Plaintiff-Appellant's constitutional and civil rights.

The errors of the Trial Court and evidence in the pleadings indicate that justice has not been served and this case should be reversed and remanded.

Respectfully submitted,

/s/ Edward H. Minor
Edward H. Minor
Plaintiff-Appellant, Pro Se

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief For Appellant has been mailed to the following attorneys for Defendants-Appellees by United States Mail, postage prepaid, on this 16th day of February, 1995:

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/s/ Edward H. Minor
Edward H. Minor
Plaintiff-Appellant, Pro Se

Supreme Court, U.S.
FILED
JAN 4 1996
CLERK

No. 95-885

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

EDWARD H. MINOR,
Petitioner,

v.

STATE OF TEXAS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ALLSTATE INSURANCE COMPANY, *et al.* IN OPPOSITION

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(listed on inside cover)

*Counsel of Record

Counsel represents the following Respondents:

1. Allstate Insurance Company
2. Allstate Property and Casualty Company
3. Allstate Texas Lloyd's Insurance Company, Inc.
4. Wayne E. Hedien
5. Raymond H. Kiefer
6. David B. Winn
7. Gary E. Briggs
8. Jane Elliott
9. A.J. Belohlavy

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals properly dismissed this action for lack of subject matter jurisdiction.

2. Whether the Petitioner's action was properly dismissed for failure to state a claim upon which relief could be granted.

LIST OF PARTIES AND NAMES OF AFFILIATED CORPORATIONS

The following individual is the Petitioner and Plaintiff/Appellant below:

1. Edwin H. Minor

The following individuals and parties are the Respondents and Defendants/Appellees below:

1. State of Texas
2. District Judge, Pat McDowell Personally and as Presiding Judge, First Administrative Judicial Region
3. Dallas County
4. County Judge Robert E. Day Personally and as Dallas County Judge
5. Allstate Insurance Company
6. Allstate Property and Casualty Company
7. Allstate Texas Lloyd's Insurance Company, Inc.
8. Wayne E. Hedien
9. Raymond H. Kiefer
10. David B. Winn
11. Gary E. Briggs
12. Jane Elliott
13. A. J. Belohlavy

14. Fisk & Fielder, P.C.

15. R. Lynn Fielder

16. Jeff D. Fudge

Under Supreme Court Rule 29.1, the following is a list naming all parent companies and subsidiaries of each company represented:

1. Allstate Insurance Company
parent(s): Allstate Corporation
subsidiary(s):

(i) After Six Holding Corporation
(ii) Cardiologic Systems, Inc.
(iii) Fallowfield Developers Limited Partnership
(iv) Quantitative Data Systems, L.P.
(v) Sanguine/A Anadarko, Ltd.
(vi) Saugutuck II Cellular Investment Corp.
(vii) Science Center Associates
(viii) Scripps Center Associates
(ix) Washington Business Park Associates
(x) Gainey Ranch Financial
(xi) HNG Storage Co.
(xii) Heard Energy Corp.
(xiii) Propane Continental

2. Allstate Property and Casualty Company
parent(s): Allstate Insurance Company
subsidiary(s): None

3. Allstate Texas Lloyd's Insurance Company, Inc.
parent(s): Allstate Insurance Company
subsidiary(s): None

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OPINIONS BELOW

The Fifth Circuit's decision was based on the district court's lack of subject matter jurisdiction over the action as well as the Petitioner's failure to state a claim for relief upon which relief could be granted under Fed. R. Civ. P. 12(b)(6). (App. at 1-4, 15-20).[1]

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[1] For the sake of brevity, Allstate has not included an appendix to this brief but instead will rely upon the appendix accompanying the Petitioner's petition and will reference its pertinent portions, as well as the relevant portions of the petition, as follows: App. at ___; Petition at ___.

No. 95-885

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

EDWARD H. MINOR,
Petitioner,

v.

STATE OF TEXAS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR ALLSTATE INSURANCE COMPANY, *et al.* IN OPPOSITION

Respondents Allstate Insurance Company, Allstate Property and Casualty Company, Allstate Texas Lloyd's Insurance Company, Inc., Wayne E. Hedien, Raymond H. Kiefer, David B. Winn, Gary E. Briggs, Jane Elliott, and A. J. Belohlavy (collectively, "Allstate") respectfully request that this Court deny the petition for writ of certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit in this action.

STATEMENT OF THE CASE

Petitioner Edward H. Minor ("Minor") was an insured of Allstate under a homeowner's policy. (Petition at 4). Allstate refused to settle Minor's claim for an alleged loss

under the policy due to his repeated refusal to submit to an examination under oath covering his alleged loss. (App. at 26-27). As a result, Minor brought suit in Texas state court on June 30, 1992 against Allstate. This action was abated by the state court because of Minor's failure to comply with the contractual provision in his homeowner's policy providing for an examination under oath. Minor then filed suit on May 3, 1993 in federal district court for alleged misconduct and civil rights violations by every defendant, opposing attorney, or judge in his abated state court action. (App. at 21-50).

The district court dismissed Minor's claims against all of the defendants/respondents for failure to state any actionable claim. (App. at 1-14). On appeal, the Court of Appeals for the Fifth Circuit held that if the district court had had jurisdiction, all of the grounds for dismissal under Fed. R. Civ. P. 12(b)(6) would have been affirmed. (App. at 8). The Circuit Court further determined, however, that subject matter jurisdiction was lacking under this Court's decisions in District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) and Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) (hereinafter the "Rooker-Feldman doctrine"). (App. at 18-20). Accordingly, dismissal of Minor's causes of action in their entirety was affirmed.

REASONS FOR DENYING THE WRIT

The format of Minor's petition makes it difficult to ascertain which of his purported "Reasons for Granting the Writ" applies to the Allstate respondents. Nonetheless, both of the Fifth Circuit's stated reasons for affirming the district court's dismissal of Allstate--lack of subject matter jurisdiction and failure to state a claim--were valid. Minor has failed to allege or identify any conflict between the Fifth Circuit's decision and that of any other United States Court of

Appeals or state court of last resort. No important federal question has been presented, let alone decided in a manner adverse to relevant decisions of this Court.

1. The district court lacked subject matter jurisdiction to review Minor's claims.

Minor's petition should be denied because the Fifth Circuit correctly determined that the district court lacked subject matter jurisdiction to review what had transpired in the state court action. The court below determined that Minor's purported federal "civil rights" action constituted an appeal from the Texas state court's entry of the abatement order. (App. at 19). The Rooker-Feldman doctrine holds that no court of the United States other than the Supreme Court shall entertain a proceeding to reverse or modify a final state court judgment because the jurisdiction of the district court is original and review of such determinations would constitute an improper exercise of appellate jurisdiction. Feldman, 460 U.S. at 476, 482; Rooker, 263 U.S. at 416; see also Johnson v. De Grandy, 114 S. Ct. 2647, 2654 (1994), again acknowledging the continuing validity of the Rooker-Feldman doctrine.[2]

As further interpreted, the Rooker-Feldman doctrine is not limited to final judgments but extends to all forms of state court actions as well. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 23-27 (1987) (Marshall, J., concurring); Feldman, 460 U.S. at 486 n.16.[3] Thus, Minor's contention on page 9 of the

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[2] Of interest is a discussion of the genesis of the Rooker-Feldman doctrine articulated in GASH Assoc. v. Village of Rosemont, Ill., 995 F.2d 726, 727-29 (7th Cir. 1993).

[3] Accord Gentner v. Shulman, 55 F.3d 87, 89 (2d Cir. 1995); Port Authority Police Benevolent Ass'n, Inc. v. Port Authority of New York and

(continued...)

petition to the contrary notwithstanding, the fact that the state court abatement order was not a final judgment is of no consequence.

It is also beyond doubt that Minor's claims against Allstate are "inextricably intertwined" with the state court's decision granting the plea in abatement. Minor attempted to allege a wide-ranging conspiracy to deny him his constitutional rights between, among others, the state court judge who granted Allstate's plea in abatement, the State of Texas, and Allstate. This Court has stated that when claims such as Minor's "are inextricably intertwined with the state court's denial in a judicial proceeding . . . then the district court is in essence being called upon to review the state-court decision. This the district court may not do." Feldman, 460 U.S. at 486 n.16. Stated differently, Minor cannot circumvent the Rooker-Feldman doctrine merely by casting a complaint in the form of a civil rights action.

The Circuit Court's decision was also consistent with other circuit courts' interpretation of the Rooker-Feldman doctrine. See, e.g., Liedtke v. State Bar of Texas, 18 F.3d 315, 317 (5th Cir.), cert. denied, 115 S. Ct. 271 (1994); Landers Seed Co. v. Champaign Nat'l Bank, 15 F.3d 729, 732-33 (7th Cir.), cert. denied, 115 S. Ct. 62 (1994); Port Authority Police Benevolent Ass'n, Inc v. Port Authority of New York and New Jersey Police Dep't., 973 F.2d 169, 177-79 (3d Cir. 1992); Keene Corp. v. Cass, 908 F.2d 293, 296-97 & n.2 (8th Cir. 1990); Hale v. Harney, 786 F.2d 688, 690-91 (5th Cir.

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[3](...continued)
New Jersey Police Dep't., 973 F.2d 169, 178-79 (3d Cir. 1992); Lancellotti v. Fay, 909 F.2d 15, 17 (1st Cir. 1990); Keene Corp. v. Cass, 908 F.2d 293, 297 & n.2 (8th Cir. 1990); Hale v. Harney, 786 F.2d 688, 691 (5th Cir. 1986).

1986). Minor has offered no authority that the Rooker-Feldman doctrine was improperly applied, and the Fifth Circuit's affirmation of the district court's granting of Allstate's motion to dismiss was proper.

2. Minor's claims against Allstate were also properly dismissed because they failed to state a cause of action under Fed. R. Civ. P. 12(b)(6).

The Fifth Circuit also held that even if the district court below had had subject matter jurisdiction, the dismissal would have been required pursuant to Fed. R. Civ. P. 12(b)(6).[4]

a. Minor's 42 U.S.C. § 1981 claims were based exclusively on "post-termination" contractual conduct that does not constitute actionable conduct.

Minor cannot assert a viable claim under 42 U.S.C. § 1981 against Allstate because his claims are based exclusively on "post-formation" contractual conduct that occurred prior to November 21, 1991. Specifically, Minor alleged that Allstate violated § 1981 by unjustifiably denying his insurance claim. (App. at 26-27). Allstate's alleged acts could have occurred only after the formation of the insurance contract between Minor and Allstate. It is undisputed that Allstate's refusal to settle Minor's insurance claim, because of his repeated failure

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[4] With respect to pleadings standards under Fed. R. Civ. P. 12(b)(6), if the district court concludes that the allegations contained in the complaint do not state a claim upon which relief can be granted, then an order of dismissal is proper. Yazoo County Indus. Dev. Corp. v. Suthoff, 454 U.S. 1157, 1161 (1982); see also Neitzke v. Williams, 490 U.S. 319, 327 (1989), holding that dismissal is proper "without regard to whether [a claim] is based on an outlandish legal theory or on a close but ultimately unavailing one."

to appear for an examination under oath, occurred in 1990. (App. at 26-34). Such "post-formation" contractual acts, as alleged by Minor, do not constitute actionable conduct under § 1981 as a matter of law under this Court's decision in Patterson v. McLean Credit Union, 491 U.S. 164 (1989), which held that the protection afforded by § 1981 extended only to the formation of contracts. The Court rejected any right under § 1981 to "enforce" contracts. Section 1981 merely guarantees access to legal process in contractual disputes. The statutory guarantee is irrelevant to post-formation claims of interference with contractual rights. Patterson, 491 U.S. at 176-78.[5]

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[5] Section 1981 as amended states as follows:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981. Subsections (b) and (c) of § 1981 were added by the Civil Rights Act of 1991, which became effective on November 21, 1991. As Amended Pub. L. 102-106, Title I, § 101, November 21, 1991, 105 Stat. 1071.

The Court recently affirmed that the 1991 amendments to § 1981, which now bring post-formation actions within the ambit of § 1981, do not apply retroactively. McKnight v. Gen. Motors Corp., 114 S. Ct. 1826 (1994); Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1506, 1508 (1994). As noted, the effective date of the 1991 amendments to § 1981 is November 21, 1991. Accordingly, the Patterson decision and its progeny bar Minor's § 1981 claims against Allstate because all of the conduct complained of against Allstate occurred in 1990, prior to the amendments' effective date.

b. Minor's pro se status was not a basis for a "class-based" discrimination claim under § 1981.

Minor also erroneously intimates that an alleged discrimination against a pro se litigant somehow qualifies as "class-based" discrimination. (Petition at 11-17). This type of allegation does not constitute a cognizable claim of class-based discrimination. See generally United Bhd. of Carpenters and Joiners of Am. v. Scott, 463 U.S. 825, 837-38 (1983).

c. Minor had no claims against Allstate for violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

To the extent that Minor claimed violations of the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution against Allstate, they too were properly dismissed because Minor failed to sufficiently allege (nor could he have alleged) that the Allstate defendants were federal officials or that they acted under the authority of federal law. See, e.g., Bivens v. Six Unknown Named Agents, 403 U.S. 388, 389-90, 395-97 (1971).

Minor's further claim of an implied right of action under the Fifth, Sixth, and Fourteenth Amendments was also

properly dismissed. Minor failed to allege (nor could he) that the Allstate defendants acted under the color of state law. See generally Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982).

d. Minor had no § 1981 claims against individual respondents Hedien, Kiefer, and Winn.

Finally, Minor sued Respondents Hedien, Kiefer, and Winn individually as "officers . . . of the [Allstate] insurance companies." (App. at 24). Minor, however, made no allegations whatsoever of specific actionable conduct against them in his complaint, and vicarious liability cannot be imposed on the individual officers of a company in their individual capacities absent allegations that they themselves participated in the alleged discrimination. Musikiwamba v. ESSI, Inc., 760 F.2d 740, 753-54 (7th Cir. 1985); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 517 F.2d 1141, 1144 (4th Cir. 1975).[6]

CONCLUSION

Minor's allegations of "conspiracy" among every individual defendant, corporate defendant, state government defendant, and/or judicial defendant are related solely to his own refusal to abide by the terms of the insurance contract. Refusing to honor his contractual obligations, and unwilling to accept or abide by the rulings of every judge to have heard his case, Minor contends that the only possible explanation for the abatement is a wide-ranging conspiracy cutting across all levels of the state and federal judiciary. As aptly stated by the trial court, Minor's "allegations against the private [Allstate]

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[6] Texas law holds that a corporate officer "cannot be held personally liable merely by reason of his corporate office." Houston Chronicle Publishing Co. v. Stewart, 668 S.W.2d 727, 730 (Tex. App.--Houston [1st Dist.] 1983, writ dism'd).

defendants are whole [sic] conclusory, having no basis save for Plaintiff's imagination." (App. at 4). Minor is attempting to re-litigate in federal court claims that were correctly disposed of through the state court abatement order.

There are no "special or important reasons" why Minor's petition for a writ of certiorari should be granted. Sup. Ct. R. 10. To the contrary, an unbroken chain of authority supports the Circuit Court's decision in this case, and nothing in Minor's petition hints at any legitimate reason for further consideration. For all of the reasons discussed above, Allstate respectfully requests that Minor's petition be denied.

Respectfully submitted,

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